

MICROFILM PREPARATION TRANSMITTAL (SENTENCING CALENDAR)

29

DOCKET NO. A- 2992-0474

STATE VS. Alberto Scabone

IN THE INTEREST OF _____

RECORD IMPOUNDED
(If applicable, Circle in Red)

~~RECORDED~~

MAR 2006

NO BRIEFS FILED

THE ATTACHED IS THE RECORD ON APPEAL TO BE MICROFILMED

1 APPELLANT'S APPENDIX
24 TRANSCRIPT DATES

March 8, 2006; Part F, Judges Conley and Winkelstein 5th Floor

THIS FORM IS TO BE ON TOP OF THE "RECORD ON APPEAL"

PREPARER'S INITIALS SF

TRANSMITTAL SHEET

#29

ESOA DATE: 3/8/06

DOCKET NO: 2992-04

COUNTY: Essex

STATE V. Alberto Scabone

STATE IN THE INTEREST OF _____

FLOOR: (5) 8

ATTORNEY ASSIGNED: Robert Seelenfreund TODAY'S DATE: 1/24/06

TO: APPELLATE DIVISION CLERK'S OFFICE
FROM: OFFICE OF THE PUBLIC DEFENDER'S, APPELLATE SECTION

The following is a list of items that are being submitted to the Court on the above-captioned appeal. The status of each item has been indicated and three copies have been enclosed. Any item to be submitted later will be sent directly to the Judges in Chambers as soon as possible.

	ENCLOSED	PREVIOUSLY SUBMITTED	TO BE SUBMITTED
DOCUMENTS			
Notice of Appeal / Appearance			
Judgement of Conviction / Order			
Plea Agreement			
Indictment(s) / Accusation(s)			
Pre-Sentence Report / Avenel			
Complaint(s) (Juvenile)			
TRANSCRIPTS			
Plea			
Sentence			
Violation of Probation			
Motion for Reconsideration			
Other items:			

FILED
APPELLATE DIVISION
JAN 25 2006
COURT CLERK

CLIENT INFORMATION: INMATE # / SBI / DOB: _____

LOCATION: _____

YVONNE SMITH SEGARS
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
P.O. Box 46003
Newark, New Jersey 07101
(973) 877-1200

H-2222 24174

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
IND. NO(S) : 80-08-4225

STATE OF NEW JERSEY, : **CRIMINAL ACTION**
Plaintiff-Respondent, : **NOTICE OF APPEAL**
v. :
ALBERTO SCABONE, : **FILED**
Defendant-Appellant. : **APPELLATE DIVISION**
: **FEB 16 2005**

..... *Jon Flynn*
CLERK

PLEASE TAKE NOTICE that the defendant, Alberto Scabone, confined at New Jersey State Prison, Second & Cass Streets, P.O. Box 861, Trenton, New Jersey 08625-0861 appeals to this Court from the final Order denying defendant's motion to correct illegal sentence entered on January 3, 2005 in the Superior Court, Law Division, Essex County, by the Honorable Joseph C. Cassini.

YVONNE SMITH SEGARS
Public Defender
Attorney for Defendant-Appellant

BY: *Claire Drugach*
CLAIRE DRUGACH
Assistant Deputy Public Defender
Intake Unit

The undersigned certifies that the requirements of R. 2:5-3(a) have been complied with by ordering the transcript(s) on February 16, 2005 indicated on the accompanying transcript request form(s) and that a copy of this Notice has been mailed to the tribunal designated above.

Yvonne Smith Segars

**ORDER PREPARED BY
THE COURT**

State of New Jersey,

Plaintiff

Alberto Scabone,

Defendant

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY: LAW DIVISION
CRIMINAL

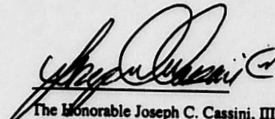
Indictment No.: 4225-08-80

ORDER

This matter having come before the Court on a Motion for Correction of Illegal Sentence filed pro se by Defendant, Alberto Scabone, on September 22, 2004, and the Court having carefully reviewed Defendant's file, has determined that Defendant's motion was originally heard on September 28, 2004 by the Honorable Eugene J. Codey, Jr., P.J.C.V. The Court, therein, concluded, that pursuant to Rule 3:22-5, the prior adjudication, upon the merits of any ground for relief, is conclusive. The Court further concluded that the defendant's motion failed to comply with the five year Statute of Limitations specified by Rule 3:22-12, and that the sentence imposed was in complete compliance with New Jersey Statutes, as fully supported by the record, and in conformance with the facts as reflected in the jury verdict, and as admitted by defendant in his testimony.

IT IS ON THIS 3RD day of January, 2005, ORDERED that the Defendant's Motion be denied.

DATED: 01/03/05


The Honorable Joseph C. Cassini, III

**SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION**

ESSEX VICINAGE

CHAMBERS OF
JOSEPH C. CASSINI, III
JUDGE



NEW COURT BUILDING
NEWARK, NEW JERSEY 07102

January 3, 2005

Alberto Scabone #258208/904520-A
New Jersey State Prison
P.O. Box 861
Trenton, NJ 08625

Cc: Olivia C. Smith, Esq.
Deputy Public Defender-Essex Region
31 Clinton Street, 5th Floor
Newark, New Jersey 7102

Cc: Paula T. Dow, Esq.
Acting Prosecutor
Essex County Prosecutor's Office
Essex County Courts Bldg.
Newark, New Jersey 07102

Re: State v. Alberto Scabone
Ind. No.: 80-08-04225-I

Dear Mr. Scabone:

Please be advised that I have reviewed your Motion for correction of illegal sentence with respect to the above matter.

A review of your file indicates that the Honorable Eugene J. Codey, Jr., P.J.C.V. previously decided this matter on September 28, 2004. The Court in that decision, concluded that your prior adjudication is conclusive pursuant to Rule 3:22-5, and that the sentence imposed was in complete accordance with New Jersey Statutes and the record. In addition, the Court sentenced you on January 14, 1994, and your motion was filed on September 23, 2004. As such, the Court found that your petition failed to comply with the five (5) year Statute of Limitations

specified by Rule 3:22-12. The Court further determined that the sentence was, also, in conformity with the facts as reflected in the jury verdict, and as admitted by you in your testimony.

Accordingly, your motion is hereby denied. Enclosed a copy of the Honorable Eugene J. Codey, Jr., P.J.C.V.'s decision with respect to this matter and a copy of this Court's Order.

Very Truly Yours,



JOSEPH C. CASSINI, III, J.S.C.

SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE

CHAMBERS OF
EUGENE J. CODEY, JR.
PRESIDING JUDGE



ESSEX COUNTY COURTS BUILDING
NEWARK, NEW JERSEY 07102

September 28, 2004

Alberto Scabone
#258208
New Jersey State Prison
Post Office Box 861
Trenton New Jersey 08625

Re: State vs. Alberto Scabone
Ind.#4225-08-80

Dear Mr. Scabone:

You were found guilty of the passion/provocation manslaughter of Monica Scabone, your wife, of the purposeful and knowing murders of Yannet Estevez, your sister-in-law, and Norma Estevez, your mother-in-law, and of second degree arson. You were sentenced by me to an aggregate prison term of eighty years with a forty-year parole ineligibility period; a ten-year prison term with a five-year parole disqualifier for the passion/provocation manslaughter; a thirty-year prison term with a fifteen-year parole ineligibility period for each of the two murders; and a ten-year prison term with a five-year parole ineligibility period for the arson. All terms were to run consecutively.

In your direct appeal, you contested the legality of your sentence. The conviction and the legality of your sentence was affirmed in an unreported opinion dated November 14, 1995 (A-3498-93T4). The Supreme Court denied certification on January 31, 1996. State v. Scabone, 143 N.J. 330 (1996).

Pursuant to Rule 3:22-5, this prior adjudication, upon the merits of any ground for relief, is conclusive.

In accordance with Rule 3:22-2 (C), a petition challenging the imposition of a sentence in excess of or otherwise not in accordance with the sentence authorized by law must be filed no more than five (5) years after rendition of the sentence sought to be attached. You were sentenced by me on 1/14/94, and, thus, your petition filed 9/23/04 fails to comply with the five (5) year Statute of Limitations specified by Rule 3:22-12.

TTY/TTD dial 711 for New Jersey Relay

1. additionally, fi. .hat the sentence I imposed was in complete compliance with New Jersey Statutes, and is fully supported by the record. The sentence was, also, in conformance with the facts as reflected in the jury verdict, and as admitted by you in your testimony.

Very truly yours,

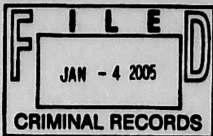


EUGENE J. CODEY, JR.
P.J.CV.

EJC/tmm

C: Norman Menz, Esq.

**ORDER PREPARED BY
THE COURT**



**SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY: LAW DIVISION
CRIMINAL**

State of New Jersey,

Plaintiff

Indictment No.: 4225-08-80

Alberto Scabone,

ORDER

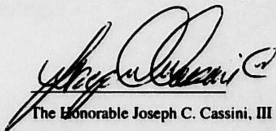
Defendant

TRUE COPY

This matter having come before the Court on a Motion for Correction of Illegal Sentence filed pro se by Defendant, Alberto Scabone, on September 22, 2004, and the Court having carefully reviewed Defendant's file, has determined that Defendant's motion was originally heard on September 28, 2004 by the Honorable Eugene J. Codey, Jr., P.J.C.V. The Court, therein, concluded, that pursuant to Rule 3:22-5, the prior adjudication, upon the merits of any ground for relief, is conclusive. The Court further concluded that the defendant's motion failed to comply with the five year Statute of Limitations specified by Rule 3:22-12, and that the sentence imposed was in complete compliance with New Jersey Statutes, as fully supported by the record, and in conformance with the facts as reflected in the jury verdict, and as admitted by defendant in his testimony.

IT IS ON THIS 3RD day of January, 2005, ORDERED that the Defendant's Motion be denied.

DATED: 01/03/05


The Honorable Joseph C. Cassini, III

SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE



ESSEX COUNTY COURT BUILDING
NEWARK, NEW JERSEY 07102

Michael Marucci, D.P.D.
Office of the Public Defender
31 Clinton Street
Newark, NJ 07102

Date: October 6, 2004

Re: Alberto Scabone

Ind. #: 80-08-04225-I

Dear Mr. Marucci,

Enclosed please find the above named defendant's motion for a Correction of Illegal Sentence filed in the Criminal Records Office on September 22, 2004.

This matter is being referred to you for further action and assignment of counsel. It has been given a control date of November 5, 2004 to be heard before the Honorable Jd Cassini.

Should you have any questions regarding this matter please contact the Criminal Records Motion Unit at (973) 693-9958.

Sincerely yours,

Darryl H. Vatsibofian
Criminal Records Manager

TRUE COPY

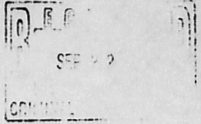
Prepared By: L.J. Bradley

CC: Judge, Prosecutor, Defendant

ALBERTO SCABONE #250208/904520-A
New Jersey State Prison
P.O. Box 861
Trenton, New Jersey 08625
Defendant-Movant, Pro Se

Presently Confined

September 13, 2004



CRIMINAL DIVISION MANAGER'S OFFICE
Superior Court of New Jersey
Law Division-Essex County
Essex County Court Building
50 West Market Street
Newark, New Jersey 07102

Re: State of New Jersey vs. Alberto Scabone
Motion To Correct An Illegal Sentence
Indictment No. 4225-08-80

Dear Sir/Madam:

Please find enclosed an original and one (1) copy of the following documents for filing:

1. Notice of Motion to Correct an Illegal Sentence, [Pursuant to R. 3:22-12];
2. Letter Brief and Appendix in Support of Motion [Pursuant to R. 2:6-2(b)];
3. Proposed Order Denying/Granting [Pursuant to R. 3:1-4(a)]; and
4. Certificate of Service [Pursuant to R. 1:5-3].

Would you be kind enough to mark an extra copy of this cover letter as "FILED", and return to me in the enclosed self-addressed stamped envelope. If there are any deficiencies, please advise me at the above mentioned address.

Respectfully submitted,



Alberto Scabone
Defendant-Pro Se

cc: Essex County Prosecutor Office
AS/File.

(1)

Hon. Eugene J. Codey, J.S.C.

ALBERTO SCABONE #258298-SB#9904529-A
New Jersey State Prison
P. O. Box 861
Trenton, New Jersey 08625
Defendant-Movant, PRO SE

PRESENTLY CONFINED

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-ESSEX COUNTY

INDICTMENT NO.-4225-08-80

STATE OF NEW JERSEY, :

Plaintiff-Respondent, :

- VS. - :

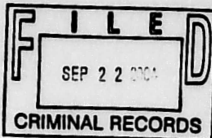
ALBERTO SCABONE, :

Defendant-Movant. :

CRIMINAL ACTION

NOTICE OF MOTION TO CORRECT
AN ILLEGAL SENTENCE PURSUANT
TO R. 3-22-12.

TO: PAULA TOMAYSHU DON
Acting Essex County Prosecutor
Essex County Court Building
Newark, New Jersey 07102




NOTICE IS HEREBY given that on the _____ day of _____, 2004, or as soon thereafter as may be heard, the undersigned defendant-movant, shall move before the Superior Court of New Jersey, Hon. Eugene J. Codey, Jr., presiding for entry of the following relief as to the above captioned matter:

1. An ORDER correcting the illegal sentence in the above captioned matter pursuant to R. 3:22-12.

In support of this motion reliance is placed upon the attached Letter Brief and Appendix made a part hereof.

Dated: 9-16-04

Respectfully Submitted,


ALBERTO SCABONE
MOVANT, PRO SE

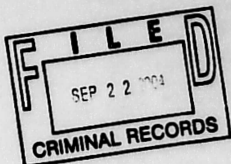
(2)

ALBERTO SCABONE #250208-SBI#940520-A
New Jersey State Prison
P. O. Box 861
Trenton, New Jersey 08625

Defendant-Movant, Pro Se

September 13, 2004

HONORABLE EUGENE J. CODEY, JR. J.S.C.
Superior Court of New Jersey
Essex County Courts Bldg.
50 West Market Street
Newark, New Jersey 07102



Re: State vs. Alberto Scabone
Motion to Correct an Illegal Sentence
Essex County Ind. #4225-08-00

Dear Judge Codey:

Please accept this letter-brief in lieu of a more formal brief in support of defendant's Scabone motion to correct an illegal sentence relative to indictment number 4225-08-00.

THE TRIAL COURT VIOLATED DEFENDANT'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS AND HIS RIGHT TO A JURY TRIAL WHEN IT SENTENCED HIM TO CONSECUTIVE MAXIMUM TERMS, INCLUDING DISCRETIONARY PERIODS OF PAROLE INELIGIBILITY, BASED UPON FACTS NEITHER ADMITTED BY DEFENDANT NOR FOUND BY THE JURY.

Defendant was convicted of two counts of murder, one count of manslaughter and one count of second-degree arson. The sentencing court, in imposing consecutive terms for the murder (30 years with a 15-year parole disqualifier for each) the manslaughter (10 years with a five-year parole disqualifier), and the second-degree arson (10 years with a five-year parole disqualifier) the maximum possible sentence allowed by law in 1981.

At the time of the offenses, defendant, as a convicted murderer was subject to the following: (1) to a term of 30 years of which the person must serve 15 years before being eligible for parole, or (2) as in a crime of the first degree except that the maximum term for such a crime of the first degree shall be 30 years." N.J.S.A. 2C:11-3(b). Defendant received the maximum term. (8T37-1 to 4).¹ That sentence is illegal and must be vacated.

In addition to the maximum sentence for murder, defendant received the maximum term of 10 years with a 5 year parole bar on the second degree conviction of arson, to run consecutive to the murder. (8T37-24 to 38-2). Judge Codey did not merged none of the convictions with the murder convictions. (8T38-4 to 7). As discussed below, like the murder sentence, the term imposed on the arson conviction is also illegal and must be vacated.

1

"8T" refers to defendant's sentencing transcripts made a part hereof in defendant's appendix marked 8T1 to 39.

The sentencing court found one mitigating factor: factor (1) Mr. Scabone has no prior record. However, the sentencing court found three aggravating factors: factor (3) the risk that defendant might commit another offense; factor (6) the seriousness of the offense; and factor (9) the need for deterrence. (8731-3 to 32-14).

None of the aggravating factors were reflected in the jury verdict nor admitted by the defendant. Rather, they were all found by the judge, by a preponderance of the evidence. See State v. O'Donnell, 117 N.J. 210, 215 (1989) (sentencing factors need only be found by a preponderance of the evidence). The judge determined that the aggravating factors outweighed the mitigating, and, as noted, imposed the maximum term of life, and the mandatory 30-year parole bar.

On June 24, 2004, the United States Supreme Court decided Blakely v. Washington, 124 S.Ct. 2531 (2004), which involves the Washington State sentencing scheme. The defendant in Blakely having pleaded guilty to a class B felony, faced a statutory presumptive range of 49-53 months and a maximum term of 120 months. The sentencing judge found aggravating facts, and imposed 90 months. Id. at 2535. Although the sentence was less than the maximum term, the Supreme Court found it unconstitutional.

The Court held that, under the Sixth Amendment, the jury, rather than the judge, had to find beyond a reasonable doubt any fact that increased the sentence above the presumptive 49-53 months. Id. at 2537.

The Supreme Court pointed out that its holding in Blakely was governed by its earlier decision in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), which held:

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

The Blakely Court concluded that, for Apprendi purposes, the relevant statutory maximum "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 2537.

The Court noted that, under Washington law, the judge could not have increased the sentence beyond the presumptive 49-53 months based solely on the facts the defendant admitted in the guilty plea. In order to increase the sentence, the judge had to take into account facts other than those which were used to compute the standard range. Id. at 2537-38. The Court observed, "Had the judge imposed the [enhanced] sentence solely on the basis of the plea, he would have been reversed." Id. at 2538; United States v. Booker, ____ F.3d ____, 2004 WL 1535858

at *4 (7th Cir. July 16, 2004) federal sentencing guidelines unconstitutional insofar as "they limit defendants' right to jury and to the reasonable-doubt standard"); United States v. Croxford, ____ F.Supp.2d ____, 2004 WL 1521560 (D. Utah July 7, 2004) (same), adhered to by United States v. Croxford, ____ F.Supp.2d ____, 2004 WL 1551564 (D. Utah July 12, 2004).

Similarly, if the judge had ordered defendant to serve the maximum life term without making any factual findings, this Court would have had to vacate the sentence. See, State v. Glover, 230 N.J. Super. 333, 344 (App. Div. 1988) (affirming life term for murder on ground that there was ample support for aggravating factors judge relied on); State v. Serroco, 95 N.J. 23, 25 (1983), citing State v. Maguire, 84 N.J. 508, 526 (1980), (life sentence for murder could be imposed upon consideration of aggravating factors); see also State v. Roth, 95 N.J. 334, 364 (1984) (reviewing court must determine whether cited aggravating and mitigating factors are based on competent, credible evidence).

Sentencing under the Criminal Code is governed by the principle of uniformity with the goal of avoiding disparity. See State v. Brinage, 153 N.J. 1, 22-23 (1998); State v. Vasquez, 129 N.J. 189, 203 (1992). Accordingly, like the Washington system at issue in Blakely, the Code sets forth sentencing

ranges and presumptive terms and requires courts to weigh specified aggravating and mitigating factors before imposing sentence above or below the presumptive term, and also spells out the circumstances in which courts can impose extended terms and periods of parole ineligibility. See e.g., 2C:43-6; 2C:43-7; 2C:44-1a, b, f(1). While the Code does not prescribe a presumptive term for murder, 2C:44-1(f), the statutory minimum term of 30 years is, effectively, the presumptive term for murder: the court could not increase defendant's sentence beyond 30 years based solely on the jury verdict.

The carjacking statute provides a useful analogy. Like murder, carjacking has a minimum and maximum term covering a wide range, but no presumptive term. In State v. Ladoyan, 290 N.J. Super. 280, 290 (App. Div. 1996), the Appellate court emphasized the need for a presumptive term "to guide imposition of a carjacking sentence beyond the mandatory minimum" and to serve as "a benchmark which may be adjusted upward or downward depending on (the court's) evaluation and balancing of the aggravating and mitigating factors." Accordingly, the court identified the minimum sentence as the presumptive term for carjacking, and required the sentencing judge to make findings of fact to justify a sentence above the presumptive. Id.; accord State v. Barardi, 369 N.J. Super. 445 (App. Div. 2004); State

v. Henry, 323 N.J. Super. 157 (App. Div. 1999). In short, the 30-year minimum is the presumptive term for murder, and the sentencing judge must find aggravating factors in order to increase the sentence above 30 years. Because all three aggravating factors the judge relied on to increase defendant's sentence were found by the judge by a preponderance of the evidence, and not by the jury beyond reasonable doubt, the eighty year term with a forty year parole bar imposed upon defendant violates his state and federal constitutional rights to trial by jury and due process of law, and therefore, must be reversed.

U.S. Const., amends. VI, XIV; N.J. Const., art I, ¶¶ 1, 10.

Defendant was also convicted of the second-degree charge of arson. The Code expressly states that the presumptive term for a second-degree offense is seven years. 2C:44 1f(1)(c). Defendant received a consecutive maximum term of 10 years with a discretionary five year period of parole ineligibility. (8T37-24 to 38-3).

In imposing the maximum term, the judge relied on aggravating factors, (3), (6) and (9), the same factors he cited in support of his decision to impose the maximum term on the murder conviction. None of those factors were reflected in the jury's verdict or admitted by defendant. Thus, for the same reason that imposition of the maximum term on the arson

conviction violates defendant's state and federal constitutional rights to trial by jury and due process, and must be vacated.

Furthermore, under N.J.S.A. 2C:44-6b, the only way a discretionary parole bar may be imposed is if the sentencing judge is "clearly convinced" that the aggravating circumstances "substantially outweigh" the mitigating. See State v. Bayless, 114 N.J. 169, 179 (1989); State v. Williams, 310 N.J. Super. 92, 98 (App. Div. 1998)(even when imposing a mandatory extended term, a trial court must not impose a discretionary parole disqualifier without first finding that the aggravating factors substantially outweigh the mitigating factors).

In imposing a minimum term pursuant to 2C:43-6b, the sentencing court shall specifically place on the record the aggravating factors ... which justify the imposition of a minimum term," 2C:44-1f(1), and its "reasons for imposing sentence, including ... consideration of the defendant's eligibility for release under the law governing parole ..." State v. Kruse, 105 N.J. 354, 359 (1987).

In addition to its findings on the various aggravating and mitigating factors, the sentencing court must "describe the balancing process" and "explain how it determined defendant's sentence." State v. Kruse, 105 N.J. at 360. See also State v. Sainz, 107 N.J. 283, 290 (1987)(rejecting State's argument

that three year mandatory minimum "encompassed an implicit finding and weighing of aggravating and mitigating factors;" resentencing ordered); State-v.-Vitale, 102 N.J. 350 (1985) (mem.)(remanded for resentencing because "the sentencing transcript does not reveal an articulation of balancing of aggravating and mitigating factors required to establish the base or parole ineligibility terms"); State-v.-Pessix, 309 N.J. Super. 126, 129-30 (App. Div. 1998)(describing the "three-step process" that must be followed before imposing a mandatory minimum sentence; and remanding because of the trial court's failure to "sufficiently articulate on the record its reasons for imposing a period of parole ineligibility...").

Thus, just as the "standard" sentence in Blakely could not be exceeded without a finding of certain factors in aggravation, the sentence in this case cannot exceed the presumptive nor can a parole bar be imposed without such findings. See Ring-v.-Arizona, 536 U.S. 584, 612, 122 S.Ct. 2428, 2445 (2002)(Scalia, J., concurring) ("W]herever [aggravating] factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.")(Emphasis added).

Additionally, in New Jersey the decision of whether or not to impose consecutive or concurrent sentencing is based on judicially established guidelines rather than by statute.²

In State v. Yarborough, 100 N.J. 627 (1985), cert denied, 475 U.S. 104 (1986) the Court established the following criteria to be followed when sentencing for multiple offenses at the same time:

- (1) there can be no free crime . . .
- (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
- (3) ...the sentencing court should [consider] ... whether or not:
 - (a) the crimes and their objectives were predominantly independent of each other;
 - (b) the crimes involved separate acts of violence or threats of violence;
 - (c) the crimes were committed at different times or separate places, rather than being committed so closely in time as to indicate a single period of aberrant behavior;
 - (d) any of the crimes involved multiple victims; [and]
 - (e) the convictions for which the sentences are to be imposed are numerous;
- (4) there can be no double counting of aggravating factors;
- (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and

N.J.S.A. 2C:12-13; 2C:13-1c(2); 2C:35-4.1; 2C:39-4.1d all require the sentence be served consecutive. N.J.S.A. 2C:44-5(3), (c), f(2)(3), (h) and (i) require the sentence be served consecutively, unless the court in its discretion concludes otherwise.

(6) there should be an overall limit on the cumulation of consecutive sentence for multiple offenses not to exceed the sum of the longest terms (including an extended term if eligible) that could be imposed for the two most serious offenses.

Id., 100 N.J. at 643-44 (footnote omitted). The Yarbough criteria has been carefully enforced and where a sentencing court has failed to follow them, court's of review have reversed or remanded for new sentencing proceedings. See State--v.-Carey, 168 N.J. 413, 424 (2001)("When a trial court fails to give proper reasons for imposing consecutive sentences at a single sentencing proceedings, ordinarily a remand should be required for resentencing"); State-v.-Miller, 108 N.J. 112, 122 (1987)(Court found it "was compelled" to remand for resentencing where trial court had failed to give separate statement of reasons for imposing consecutive sentences); State-v.-Cook, 330 N.J. Super.

395, 423 (App. Div. 2000)(a remand is ... necessary for the sentencing judge to give a separate statement of reasons for the imposition of consecutive terms to enable us to determine whether the imposition of consecutive sentences was a proper exercise of discretion").

Indeed, not too long ago, our Supreme Court addressed the concurrent/consecutive sentencing decision thusly: "A trial judge's discretion remains guided by the seminal precepts set forth in State-v.-Yarbough, 100 N.J. 627 (1985)." State-v.-Ellis, 346 N.J. Super. 583, 590 (App. Div.) aff'd 174 N.J. 535 (2002).

Since the Yarbough guidelines are of judicial creation and have the force of law, Blakely applies to this sentencing decision as well. Consequently, inasmuch as the Yarbough guidelines require a judge to make factual findings beyond the facts found by the jury or admitted by the defendant, imposition of a consecutive term violates the right to trial by jury.

Clearly, under Blakely, Apprendi and Ring, a defendant has a right to have a jury, not a judge, make the aggravating factor findings (other than prior record), including the findings in support of imposing consecutive terms, and that right is violated when, as here, a judge makes the findings instead, and consecutive terms exceeding a flat presumptive term are imposed. Accordingly, Blakely, Apprendi, and Ring, limit

HONORABLE EUGENE J. CODY, JR. J.S.C.
Superior Court of New Jersey
Essex County Courts Bldg.
50 West Market Street
Newark, New Jersey 07102


Page Thirteen

defendant's exposure to the "statutory maximum," which in his case is the presumptive seventy years with a thirty-five year parole bar for his murder convictions, and a consecutive maximum term of ten year with a five year parole bar for his arson conviction.

CONCLUSION

For the reasons stated within defendant's Letter-Brief, the Court should vacate his convictions. Alternatively, for the reasons stated within the Letter-Brief the Court must merge his convictions under Count One, Three and Four into Count Two for the reasons stated here, it must find his sentences unconstitutional and either modify them or remand his case for a new sentencing proceedings.

Respectfully submitted,


ALBERTO SCABONE
MOVANT, PRO SE

Hon., Eugene J. Coday, J., S., C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ESSEX COUNTY

Indictment No., 4225-08-80

STATE OF NEW JERSEY,

Plaintiff-Respondent,

- vs. -

ALBERTO SCABONE,
Defendant-Movant,

CRIMINAL ACTION

On Motion to Correct
An Illegal Sentence

Motion Brought Pursuant To:

R. 3:22-12,

APPENDIX ON BEHALF OF DEFENDANT-MOVANT,

TRUE COPY

ALBERTO SCABONE #258208
SBI940520-A
New Jersey State Prison
Post Office Box 861
Trenton, New Jersey 08625

PRESENTLY CONFINED

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1 SUPERIOR COURT OF NEW JERSEY
2 CRIMINAL DIVISION - UNION COUNTY
INDICTMENT NO. 4255-8-80

3 STATE OF NEW JERSEY, :

4 Complainant, :

5 vs. :

TRANSCRIPT OF
SENTENCE

6 ALBERTO SCABONE, :

7 Defendant. :

8
9 Date: January 14, 1994
Place: Union County Courthouse
Elizabeth, New Jersey

10
11 B E F O R E :

THE HONORABLE EUGENE J. CODEY, J.S.C.

12
13 TRANSCRIPT ORDERED BY:

OFFICE OF THE PUBLIC DEFENDER, Lisa Lynch

14
15 A P P E A R A N C E S :

16 THOMAS C. HUTH, ESQ.
17 ASSISTANT PROSECUTOR
For the State

18 KEVIN A. McLAUGHLIN, ESQ.
19 DEPUTY PUBLIC DEFENDER
For the Defendant

20
21
22 YVONNE DAVION, C.S.R.
23 OFFICIAL COURT REPORTER
24 ESSEX COUNTY COURTHOUSE
25 NEWARK, NEW JERSEY

1 THE COURT: We're here on sentence day on State of New
2 Jersey v. Alberto Scabone on indictment number 80-8-4225.

3 Could we just get the formal appearance of all the
4 parties, including the interpreter for the Public Defender's
5 Office who is present with us today who was also present
6 throughout the entire trial and proceeding for Mr. Scabone.

7 MR. HUTH: Your Honor, Thomas C. Huth, Essex County
8 Prosecutor's Office, homicide squad.

9 MR. McLAUGHLIN: Kevin A. McLaughlin from the Office
10 of the Public Defender, Essex Region on behalf of Mr. Scabone.

11 THE INTERPRETER: Sara Cohen, Spanish interpreter.

12 THE COURT: Mr. McLaughlin, have you had a chance to
13 review the presentence report? I know when we last left there
14 was a motion that was pending to have me recuse myself from
15 these proceedings. Also there was a number of letters that
16 were sent in, and I don't know if Mr. Huth was been kind enough
17 to get you copies, from a number of the family members of the
18 victims' family. There's a stack that I received just in this
19 morning's mail, some from Martha Gonzalez, Anna Gonzalez. I
20 don't know if you got copies of all the letters.

21 MR. McLAUGHLIN: Your Honor, I have not, but if it
22 please the Court, I'd like to address the motion first, if I
23 may.

24 THE COURT: Go right ahead.

25 MR. McLAUGHLIN: Your Honor, as I know the Court is

1 aware, Counsel has the highest respect for the integrity and
2 honesty of this Court. And bluntly, it pains me to have to
3 renew this motion. But notwithstanding that, I have to renew
4 the motion, your Honor.

5 I believe that this trial was conducted in a
6 scrupulously fair manner. It would be to powers greater than I
7 to determine whether it was done without legal error either on
8 my part or your part or Mr. Huth's part. But, I am going to
9 renew my application that the Court recuse itself for the
10 purpose of this sentence.

11 To recap briefly, your Honor, at the conclusion of the
12 trial, after the verdict was taken, the Court took an
13 opportunity to address the jury with regard to several issues.
14 One of those issues had to do with the admission in evidence of
15 the photograph of Monica Scabone at the party. And I was
16 concerned that the Court felt compelled to explain the
17 circumstances that may or may not have surrounded one, the
18 admission of that photo into evidence and two, what may have
19 happened or may not have happened at or about the time that the
20 photograph was taken.

21 But, of more concern was the Court's assurance to the
22 jury, at that time, that Mr. Scabone would be receiving, and
23 I'm paraphrasing, Judge, I'll rely on the record for any appeal
24 purposes, you did assure the jury that, and again by
25 paraphrase, if you had any say in the matter, that Mr. Scabone

1 would be receiving the maximum sentence for each of the
2 offenses.

3 I was concerned at the time, your Honor, that the
4 Court had pre-judged this matter prior to receiving the
5 presentence investigation report, that the Court may have
6 gotten caught up in the emotion and the excitement of the
7 trial. I asked, at that time, that the Court consider recusing
8 itself from imposing sentence in this matter. And again, so
9 it's clear, your Honor, I have the utmost respect for this
10 Court, for both its integrity and its dignity and its honesty.

11 I know that the Court always strives to impose
12 sentence or a ruling in accordance with the law. But, I am
13 concerned that the Court may have become unwittingly
14 emotionally caught up in this matter. And, I wonder if it is
15 perhaps not better, under all of the circumstances, even if
16 it's only to avoid the appearance of a problem, that the Court
17 recuse itself from imposing this sentence. I'm going to ask
18 the Court to do that and to recommend that the sentence be
19 transferred either to the assignment judge for reassignment or
20 this Court being the executive judge for the floor perhaps to
21 be reassigned to another judge here on the floor.

22 THE COURT: Mr. Huth.

23 MR. HUTH: Just briefly. I would object to said
24 motion primarily because the comments made by the Court, and I
25 want the record to be clear on this, were made after, number

1 one, the verdict came out. Number two, after the jury was
2 polled as to a unanimous verdict. And number three, after the
3 Court gave its discharging instructions to the jury. It was at
4 that point, once the verdict was "sealed" that the Court made
5 comments to the jurors and told the jurors certain things in
6 the case that they were not allowed to hear during the course
7 of the deliberation.

8 I find nothing wrong with that. Number one is that I
9 think the jury should be entitled to hear certain things that
10 were withheld from them during the course of their
11 deliberations, after they have deliberated and rendered a
12 verdict. So, there has been no prejudice, whatsoever, to the
13 jury. Number two, I can't understand how your Honor could
14 possibly prejudice himself by voicing opinions that he had
15 after hearing 2 weeks of testimony of this trial.

16 This trial was one of the most emotional ordeals I
17 have ever been involved in. And to just sit there and to
18 pretend that it doesn't effect you is inhuman. You voiced
19 concerns or strike that, you voiced your emotions. I find
20 nothing wrong with that. In the meantime you have had an
21 opportunity to look at a presentence report. You will have an
22 opportunity to listen to Counsel and possibly the defendant if
23 he wishes to talk and you will have an opportunity to listen to
24 family members. And I am confident that the Court can make its
25 decision based upon that.

1 I just don't think that you can sit up there in a
2 vacuum and listen and go through an ordeal like this and not
3 have some opinion and not have some feeling about it. I do not
4 think that will cloud your judgment regarding today's
5 sentencing.

6 It was a very emotional trial. It was a very
7 upsetting trial for everyone involved. And I kind of thought
8 that your comments were appropriate. It's because of that,
9 Judge, I don't think you should recuse yourself.

10 THE COURT: Okay. When Mr. McLaughlin did in fact
11 make the motion, I did check up on the statutes and the court
12 rule that does apply. And just for purposes of an appellate
13 tribunal reviewing this proceeding, because I'm not going to
14 recuse myself, I did, in fact, review the court rules,
15 including but not limited to rule 1:12-1. And some of the
16 applicable case law including but not limited to State vs.
17 Courtney which is cited at 199 N.J. Super. at page 368. And, I
18 see absolutely no reason, either in case law or in the court
19 rules, for me to recuse myself from these proceedings.

20 I sort of try to make sure that everybody gets a fair
21 trial in this Court and I think that's why the attorneys like
22 to try trials up here. And many of the rules that were
23 presented during the course of the case I know upset the
24 Prosecutor's Office because a lot of them were very, very
25 favorable to Mr. Scabone, especially including a number of the

1 photographs and a number of evidence regarding prior beatings
2 and abuse by Mr. Scabone upon Mrs. Scabone that were withheld
3 from the jury.

4 I always try to let my jurors know reasons for delays
5 in trial and what went on in there absences at side bars. I
6 think jury members, after a verdict is in fact sealed, is
7 entitled to know a little bit about the case, what went on and
8 certain reasons for certain things that were done during the
9 course of the case. And that's what I attempted to do in this
10 case.

11 So, I fully intend to go forward with the sentencing
12 today. Mr. McLaughlin has preserved the rights of Mr. Scabone
13 today in the event that an appellate tribunal disagrees with my
14 philosophy. And assuming it will be upheld, as of today, I
15 have no intention of having this case be reassigned to another
16 judge because I don't think anything was done improper in this
17 case.

18 Mr. McLaughlin, I know we initially discussed about
19 some of the letters. I don't know if there was a whole sheaf
20 of documents that came in in today's mail. I don't know if you
21 had a chance, all from family members. Again every one of the
22 letters was very emotionally written, all asking for the
23 maximum custodial sentence to be imposed on Mr. Scabone.

24 In fairness to you, I don't know if you need a chance
25 to look at each and every letter. They basically asked the

1 Court not to shave any time off of Mr. Scabone's possible
2 exposure and sentence him to the maximum under the statute that
3 was in effect back when this incident occurred, which was the
4 old homicide statute. Subsequent to the date of the offense,
5 the statute was amended to a much higher degree of exposure.
6 But Mr. Scabone's coming under the old statute.

7 MR. McLAUGHLIN: Your Honor, I had not had an
8 opportunity to review the letters but I can indicate to the
9 Court that it's not necessary for me to review them prior to
10 the imposition of sentence. I would appreciate the opportunity
11 to review them perhaps after the sentence proceeding. But
12 counsel does not feel that there could be anything in the
13 letters that would provide the basis for some legal objection.
14 Family members are absolutely entitled to express their
15 feelings. And in a case such as this, one would expect those
16 feelings to be strong and emotional.

17 I would appreciate the opportunity to review them but
18 it's not necessary that we review them prior to the imposition
19 of sentence.

20 THE COURT: No problem. We'll make you up a complete
21 xeroxed set of documents. And, again, none of the documents
22 are in mitigation of Mr. Scabone's sentence, but to the
23 opposite. They're all asking for the maximum sentence to be
24 imposed upon Mr. Scabone.

25 MR. HUTH: Judge, just for the record, I told family

1 members if they wish to write letters to send them directly to
2 the Court. I must have not seen the substance of those letters
3 either. So if I had them I would have given them to Mr.
4 McLaughlin.

5 THE COURT: No problem. Truthfully the mailman just
6 came before we came out. I just got them and they were for Mr.
7 Scabone so I brought them out with me.

8 MR. McLAUGHLIN: I've had an opportunity to review the
9 presentence investigation report with Mr. Scabone. We find it
10 to be accurate and sufficient for the purpose of sentence. I
11 would make note of the following correction, a minor one at
12 that, your Honor. On page 1 of the section entitled Uniform
13 Defendant Intake which is approximately the seventh page in the
14 report, the report is paginated, at least the copy that I have,
15 Mr. Scabone's birth date is indicated as being 10/5/53 there.
16 On the face page of the report is the true birthdate of 11/5/54
17 as indicated.

18 THE COURT: Note that correction.

19 MR. McLAUGHLIN: Other than that, we find the report
20 to be accurate sufficient for the purpose of sentence.

21 THE COURT: Okay. Mr. McLaughlin, any statements
22 you'd like to make on behalf of Mr. Scabone? Anything Mr.
23 Scabone himself would like the Court to hear?

24 MR. McLAUGHLIN: Your Honor, I would like to address
25 the Court, if I may, with regard to the imposition of sentence.

1 THE COURT: Sure.

2 MR. McLAUGHLIN: Your Honor, I would note first that
3 in spite of the commentary during the course of trial and prior
4 to the trial, no one has seen fit to adduce any evidence that
5 Mr. Scabone has ever been accused of or convicted of any
6 criminal conduct anywhere outside of the United States. The
7 prior adult criminal history indicates a charge with an arrest
8 date of March 31, 1980 that was dismissed one month, I'm sorry,
9 the next day, I apologize, according to the report and then
10 this matter appears.

11 There's no indication of any juvenile history. And as
12 nearly as I can tell, there's no evidence of any problems with
13 the law outside of the United States. There may well be, but I
14 don't have competent documentation to that effect and nor does
15 the Court. So, preliminarily I'm addressing that matter. Mr.
16 Scabone has no prior indictable convictions. Has no prior
17 convictions of any kind.

18 I should state, your Honor, that in the text of the
19 report, Mr. Scabone indicates that he is, in fact, innocent.
20 And, in essence, re-alleges that which he alleged in his
21 testimony at trial. I do not, in any way, want the Court to
22 feel that I am in any way, that he is, in any way, coming away
23 from his assertion of innocence. I have to address the Court
24 based on the conviction that was returned by this jury.

25 If I make references to acts committed to Mr. Scabone,

1 attributed to Mr. Scabone, those will be obviously because the
2 jury has convicted him of those. I don't want anyone to feel
3 that I have in any way conceded that he is in fact guilty of
4 these offenses. But, Mr. Scabone understands, as does counsel,
5 he is convicted of these offenses and he will be sentenced on
6 them.

7 Given that, your Honor, I think that we should move to
8 what is the appropriate sentence. Obviously one of the first
9 things that we would want to deal with in the imposition of the
10 sentence under circumstances such as this is the double
11 counting of aggravating factors. One of the problems, if you
12 will, with convictions for homicide and its subspecies is that
13 those convictions presume the death of the victim. And,
14 obviously the Court is aware that the seriousness of the harm
15 is simply not something that we can consider when the verdict
16 is some form of homicide.

17 I wanted to be clear to all persons, there are 3
18 people dead. Mr. Scabone stands convicted of causing those
19 deaths. I think the most salient point to be considered in
20 imposing sentence is what were the circumstances surrounding
21 the commission of the crime. Again, assuming for the purpose
22 of this argument that Mr. Scabone committed the crimes, the
23 State, during the trial, through Miss Camacho and through
24 attempts to characterize circumstantial evidence, I'm sure, is
25 going to urge upon the Court that Mr. Scabone, cold-bloodedly

1 and without feeling of any kind, executed Norma and Yanette.

2 That's not so, your Honor. That is simply not so. It
3 flies in the face of the proofs in this case. It flies in the
4 face of the verdict in count 1. Your Honor, the State can't
5 have it both ways, either Mr. Scabone was subject to bursts of
6 temper during which he lost control, or he's a cold-blooded
7 murderer, one or the other.

8 Now, they got their conviction based on theory, number
9 1. That's how they got it, that he would fly into a rage and
10 abuse his wife. And in point of fact he flew into a rage on
11 this date and ultimately caused her death. I guess the State
12 will urge that he then had some period of time to consider what
13 he would do next. I should indicate to the Court that there's
14 no proof of that whatsoever. It would appear that the jury
15 agreed the killing of Monica Scabone was done in the heat of
16 passion pursuant to adequate provocation. And I think that in
17 some large measure we have to accept that part of the verdict
18 as well.

19 They say it happened that way, Judge. I don't say it.
20 Mr. Huth doesn't say it. The jury says it. Heat of passion,
21 adequate provocation.

22 Now, do the subsequent deaths, the ones for which the
23 jury returned verdicts of murder, do we characterize those as
24 being committed after a sufficient period of time had passed to
25 allow Mr. Scabone to rationally think through what had

1 happened? I suggest, your Honor, that the excitement of the
2 one killing and the irrationality that in fact caused it to
3 occur in the first instance, was carried over. He should never
4 have killed Monica. That's obvious.

5 Obviously he should never have killed Yanette or
6 Norma. But, to assume that the one was done in the heat of
7 passion and the other one was done upon cold passion, it's just
8 an assumption. It's a continuation, obviously a continuation
9 of agitated state that the jury felt it was not appropriate to
10 convict of passion provocation manslaughter. We accept that
11 verdict. But, I've read Mr. Huth's sentence memorandum, Judge.
12 He wants you to give 4 consecutive nose to nose sentences. He
13 wants you to give 30 with 15, 30 with 15, that's 60 with 30.

14 Then he'd like you to give 10 with 5 to count one,
15 that would be 70 with 35, and then we got a second degree
16 arson. What the heck, we'll throw in another 10 with 5 for
17 that. That would be 80 with 40. A genteel sufficiency under
18 anybody's criteria. But, your Honor, that fails to take into
19 account what happened. Simply running these sentences
20 consecutive will satisfy the blood lust that runs in all of our
21 veins to some extent or another.

22 It would certainly, I don't think it would satisfy the
23 family members of the deceased victims. But it's the maximum
24 that you can give and that's what they'd have to live with.
25 And certainly that's what they want you to give. But, I think

1 your Honor needs to take a longer look at this incident. This
2 was one incident. This was not a series of incidents. This
3 was one circumstance from the moment the knife was wielded
4 against Monica Scabone -- if in fact she was the first person
5 killed, I think we have to accept that based on what the jury
6 verdict is -- until the time that the fire was set.

7 If you choose to take a series of snap shots then it's
8 very easy to impose consecutive sentences. It's simple. These
9 are discreet events. Your Honor, I don't think the Court
10 believes that these are discreet events. I think the Court
11 should be well satisfied that this was something that took
12 place, at least in Mr. Scabone's mind, all at once in a jumble.
13 I'm not looking to excuse the taking of human life. It's
14 inexcusable at any level and we are without power to seek the
15 appropriate retribution.

16 Your Honor, I'm not a particularly religious person
17 but I do believe that that power rests only in one place and
18 it's not here in this courtroom. A higher authority will
19 ultimately judge Mr. Scabone. We have to do our job now.

20 I am going to urge upon the Court that the Court see
21 this for what it really was, which is one ongoing course of
22 conduct. One incident all provoked by the same, unjustifiable
23 perhaps, but the same rage.

24 Mr. Scabone indicates in the presentence report that
25 he suffers from depression. He believes his mental health to

1 be poor. There's certainly evidence in the trial testimony
2 that others believed that he was in need of psychiatric help.
3 There's evidence that he was confined to a psychiatric
4 institution. I think there's evidence that he escaped from
5 that institution. To characterize Mr. Scabone as being a
6 dangerous psychotic on the one hand and a cool dispassionate
7 killer in the other, would be for the simple expedience of
8 giving him the maximum, Judge. It wouldn't reflect what is
9 true. It's either one or the other.

10 The real truth is, your Honor, that these sentences
11 should be run concurrent to one another and that presents a
12 problem for us, for the Court, for the litigants. You see,
13 we've gotten used to the new 2C, Judge. Murderers now get 30
14 years without parole. That's what they get. That's what the
15 law says they get. But, justice and the law on April of 1981
16 provided that murder was 30 with 15. That was the law and that
17 was the maximum then, Judge.

18 All the discussion in Mr. Huth's sentence memo about
19 Yarborough is in some measure unnecessary. No one can deny
20 that there are 3 dead bodies, 3 human beings are gone. But,
21 the imposition of this sentence should take into account more
22 than that lust for punishment. Thinking persons reviewing the
23 totality of this case cannot help but conclude that all of this
24 took place in one jumble. Again, I'm not trying to justify it
25 but I think it's important to understand that these are not

1 cold and dispassionate acts that are independent of one
2 another. Bad decision making, oh absolutely, to the point of
3 taking human life, not to be rationally explained.

4 But, I didn't think that one could conclude that Mr.
5 Scabone was being irrational at the time. Had it been that
6 everyone recognized how dangerous his bursts of temper were
7 previous, if he had gotten some treatment, I can't guess at
8 that, Judge. But I hope the Court's not going to guess at some
9 cold and dispassionate, you know, this theory of the case where
10 he kills his wife and then he sits there tapping the knife on
11 his hand until the rest of the family members get home.

12 There's certainly an inference of that from the
13 testimony of Camacho. But it's just that, it's only an
14 inference, Judge. And even if it were so, that still would not
15 mean that Mr. Scabone had returned to his right senses in time
16 to prevent those 2 additional killings. It is wholly
17 appropriate for this Court to impose concurrent sentence,
18 Judge, your Honor. Yarborough says you should generally
19 impose, if the Court feels it's appropriate, 2 consecutive, the
20 more serious.

21 But, Yarborough also says that one should look at
22 whether it was simply one incident. Whether it's derivative of
23 the same excitement that caused the jury to convict for passion
24 provocation in the first instance.

25 I'm not trying to excuse the death of Mr. Scabone's

1 mother-in-law and sister-in-law, but, your Honor, I think 4
2 consecutive sentences is preposterous under the circumstances.
3 It may leave some feeling a little cold, but that may well be
4 because we've become used to the more serious punishments that
5 the legislature subsequently enacted. I think we need to
6 divorce ourselves from that, Judge. We need to go back to 1981
7 when the law was 30 with 15.

8 I would ask the Court to impose a sentence in toto of
9 30 years with a 15 year period of parole ineligibility. And I
10 don't say that lightly, your Honor. Because if the Court chose
11 to run the 4 counts concurrent to one another, you don't have
12 to give 30 with 15. Mr. Scabone's got no priors. There are
13 any number of mitigating factors that could apply to Mr.
14 Scabone, not the least of which is that he may not have been in
15 full control of his faculties at the time, your Honor.

16 Thirty with 15 back in those days, if you had a 18 or
17 19-year-old defendant in front of you and you thought that he
18 had made a dreadful mistake, you didn't have to give him 30
19 with 15. You could have given him a flat 20. Now, I'm saying
20 all right go ahead, give Mr. Scabone the 30 with 15, take into
21 account the fact that those last 2 killings did not have to
22 happen. Take into account, as I'm sure the State will remind
23 you, that there were any number of stab wounds that way
24 exceeded the number required to end life.

25 There are some things about this case that are

1 unpleasant that might lead the Court to impose a sentence
2 greater than the presumptive sentence. But, 4 consecutive
3 sentences is greater than any rational sentence, your Honor.
4 Four consecutive sentences is not called for. It's not, just
5 under the circumstances..

6 I suspect that if the Court does impose the sentence
7 of 30 years with a 15 year period of parole ineligibility, that
8 you will have taken into account those aggravating factors in
9 providing, one, not only a period of parole ineligibility, but
10 the maximum period of parole ineligibility. Your Honor, I
11 think that I will conclude my comments at that point. Thank
12 you, your Honor.

13 THE COURT: Mr. Scabone, is there anything that you'd
14 like to say to the Court before we impose sentences? There are
15 a lot of members of the Estevez family present in the first 2
16 rows.

17 MR. SCABONE: I think Mr. McLaughlin defended me in
18 the right way that it should have been done.

19 THE INTERPRETER: Your Honor, may I ask Mr. Scabone
20 for one word, to clarify one word?

21 MR. SCABONE: If there were certain evidence, it would
22 have been different to begin with. Mrs. Anna in 1989 she never
23 speak.

24 THE COURT: I'm sorry, Mr. Scabone, you've got to
25 speak very slow, Mr. Scabone, because of the interpreter.

1 MR. SCABONE: Because for me I say really fast. Mrs.
2 Anna in the statement of 1981 --

3 THE COURT: Madam Interpreter, will you tell him while
4 you're interpreting he has to stay quiet so we can get what
5 you're saying. Madam Interpreter, can you put on the record
6 what you can recall he just said?

7 THE INTERPRETER: I just mentioned to Mr. Scabone that
8 while I'm speaking he remain quite.

9 THE COURT: What would you like us to know because you
10 have to go very slowly.

11 MR. SCABONE: Excuse me.

12 THE COURT: That's okay. When the interpreter is
13 interpreting for our reporter here, you can't continue to keep
14 talking or go on to a new statement because we're still doing
15 the old statement.

16 MR. SCABONE: Mrs. Anna in 1981, she never mentioned
17 about the fire. In 1989 it was taken another statement from
18 her but she never mentioned again about the fire. Let's say if
19 I killed my wife, I kill Norma, I kill Yanette, I kill Fito, I
20 kill the Peruvian and I give my car to them so they can go to
21 work, that's something stupid. Excuse me. Mrs. Halea, at the
22 end, she say that the boy knows everything. He remembers
23 everything. You may believe, you may think that I'm guilty,
24 but this is not about thinking, but it's about believing. I
25 may continue for a long time.

1 THE COURT: Anything you've got to say, Mr. Scabone,
2 now is your chance to say it.

3 MR. SCABONE: Well, I want to appeal and I'm going to
4 appeal. If I think that it was not just, excuse me, I'm
5 smiling, what else, many more things, what can I say. If Mr.
6 Nelson was allowed to give a statement, he collaborated with
7 police. If you check the reports you can see, I'm not going to
8 say that I've never said I'm going to kill you. What's more, I
9 always say, I mentioned in my cell, I came back from vacation
10 with Monica. She came the 15th. I came, we came back from
11 vacation. I came back from vacation and I killed a woman.
12 This is not the case but anyway here I am. I'm going to appeal
13 and let's see what's going to happen.

14 THE COURT: After today Mr. McLaughlin will file the
15 necessary papers. You have 45 days from today's date, Mr.
16 Scabone. Mr. McLaughlin will protect your interest by filing
17 the appeal.

18 MR. SCABONE: Thank you and excuse me.

19 THE COURT: Mr. Huth, I see a number of the members of
20 Estevez family and some of the other family members and friends
21 here today.

22 MR. HUTH: Judge, what I'd like to do is just address
23 some legal issues and then I'd like to have them talk.

24 THE COURT: Sure.

25 MR. HUTH: Judge, what was adduced during the course

1 of trial from Elliot Cammaroto Camacho was Alberto Scabone told
2 him that he had a fight with his wife and during the course of
3 the fight he told her that she grabbed the knife and then he
4 grabbed the knife from her and he stabbed her. That is
5 reflected in the jury's verdict. But, he also tells her that
6 he kills Norma, the mother, the 59-year-old mother and
7 19-year-old Yvette as they come into the apartment. This is
8 what he tells her.

9 This is not a killing that is done all at once and the
10 jury reflected that in their verdict. They said passion
11 provocation for Monica Scabone and purposeful or knowing murder
12 for both Yvette Estevez and Norma Estevez. So I submit,
13 Judge, that these are separate and distinct acts.

14 The argument that Mr. McLaughlin is making to urge
15 concurrent terms with all of these offenses, the question, in
16 my mind is, well, whose crime does he get the 30 years with 15
17 years on? Is it because of killing Yvette Estevez or is it
18 because of killing Norma Estevez? Where do you fit the
19 aggravated arson in? Where do you fit the life of Monica
20 Scabone in that sentencing scheme? What he's asking for,
21 basically, is a free crime. Give me one, run the others
22 concurrent and I'm basically going to get free crimes for 2
23 bodies.

24 I submit, Judge, that that flies against the law that
25 I have submitted in my sentencing memo. Again, Judge, the

1 crimes have different purposes. They are separate and distinct
2 acts. The first is a passion provocation manslaughter and the
3 second 2 are purposeful or knowing murder probably to cover up
4 his acts. That wasn't enunciated, but the reference is there.
5 The inference can be drawn.

6 Norma Estevez was killed with her jacket on and her
7 shoes on. Nineteen year old Yanette was killed fully clothed
8 with her shoes on. These women, the Court can draw an
9 inference, had come into the apartment and that's what they met
10 in the apartment. Then he takes the women, puts 2 twin beds
11 together, places them on the twin beds, lights them on fire
12 with a flammable liquid, hence the aggravated arson.

13 Regarding the aggravated arson, we have a whole
14 separate class of victims. Besides the fact that he's burning
15 his own premises, we have the Melillo family that lives on the
16 second and third floors. They are forced out of their house
17 because of this fire.

18 So, regarding the imposition of consecutive versus
19 concurrent sentences, I'm going to ask the Court to consider
20 the opinion of State vs. Sebastian Montouri where it is clearly
21 laid out in that case where the imposition of 3 consecutive
22 life sentences for a triple homicide that occurred over a
23 single time period in an apartment on South Orange Avenue here
24 in Newark, very similar circumstances, 3 people killed around
25 the same time within a single dwelling, the Court gave 3

1 consecutive life sentences.

2 The rationale relied on was because of the unique
3 status of murder, the present case is not controlled by State
4 vs. Yarborough. So when you're talking about consecutive
5 versus concurrent sentences, the Supreme Court, the Appellate
6 Division, has said that murder holds a different type of light.
7 Specifically it states that in State vs. Zarinski, 75 N.J. 101
8 on page 107, and I quote, "the legislature has not expressly or
9 inferentially suggested an intent to reduce the punishment for
10 those convicted of multiple murders."

11 These are 3 murders. Now, one is a murder committed
12 in the heat of passion but they are 3 murders. It goes on to
13 say that the legislators' intent that a defendant may be
14 subject to a life term for every homicide of which he is found
15 guilty. So, the case law is there. It takes homicide and it
16 separates it from every other offense as it should.

17 Your Honor, that brings us to the point where now you
18 must make a determination whether or not you can impose the
19 maximum for each of these offenses and that is going to be
20 based upon the aggravating factors. Do the aggravating factors
21 outweigh the mitigating factors under 2C:44-1. I submit that
22 aggravating factor number 1 does apply. Even though this is a
23 murder and you can't say that the gravity of harm inflicted the
24 deaths, I agree with that. However, we're talking about a
25 situation where these 3 women were stabbed a total of 96 times

1 and then the desecration on the women because their bodies were
2 thrown on the bed, doused where a flammable fluid and lit on
3 fire.

4 So there is a specially heinous nature to this
5 particular offense. That's why I submit that aggravating
6 factor number 1 does apply. Aggravating factor number 2, the
7 gravity and seriousness of the harm inflicted on the victim,
8 including whether or not the defendant knew or reasonably
9 should have known that the victim of the offense was
10 particularly vulnerable to advanced age. Norma Estevez was 59
11 years old. There is an aggravating factor in number 12 that
12 does not apply because if Norma Estevez was 60, aggravating
13 factor number 12 does apply.

14 So, we're talking about a 59-year-old woman who,
15 because of her advanced age, probably cannot defend herself
16 like a younger woman could, and that should count as an
17 aggravating factor. Aggravating factor number 3, the risk that
18 the defendant will commit another offense. Judge, you even
19 heard evidence of that. I'm not talking about a conviction,
20 but you heard Elliot Cammaroto Camacho say that this guy had
21 told her that he was going to kill her just like he killed his
22 family in New Jersey. And she asked him really, like the way
23 you would do to your family in New Jersey and he said yes, if I
24 have to, I will.

25 So there's a risk that he's going to do it again.

1 Aggravating factor number 9 is a need for deterrence. I mean,
2 I don't even have to address that. This type of conduct has to
3 be deterred.

4 Judge, I submit that because of the aggravating
5 factors outweigh the mitigating factors number 1, the Court can
6 impose the maximum terms. We're talking about a 10-year period
7 for the manslaughter with 5 years without parole. A 10-year
8 period for the aggravated arson with 5 years without parole and
9 then a 30-year term with 15 years without parole for each of
10 the murders.

11 What I'm asking the Court to impose is a total term of
12 80 years with 40 years without parole because of these
13 offenses. Judge, it's at this moment I would ask that the
14 Estevez family and friends be allowed to address the Court.

15 THE COURT: Sure. Just for the purposes of the
16 proceedings, we have an official court interpreter here with
17 us, Lauren Egbert from the A.O.C.. Ma'am, could you give us
18 your name and spell it for us please.

19 M A R T H A G O N Z A L E Z, SWORN.

20 THE COURT: What would you like to tell us?

21 MS. GONZALEZ: Your Honor, I want to tell you that my
22 life, since the second of April of 1981, to this date, has been
23 a true hell. In a constant depression I have been unable to
24 resign myself to the unjust loss of my mother and my beloved
25 sisters. Your Honor, this man who is in front of us is a man

1 without scruples, without feelings, without a heart. At this
2 moment I have pleaded with God all these years asking for
3 justice.

4 Today I ask, I plead with your Honor in the name of my
5 sister Anna Gonzalez, in the name of Elliot Alverado and in my
6 own name that you have no pity, just as he had no pity with my
7 loved ones. And that you give him the maximum sentence. If it
8 is possible, the electric chair, although this would not repay
9 the damage that he's done to us. I want also to thank the
10 ladies and gentlemen of the jury for their correct verdict.
11 Thank you.

12 Your Honor, in your hands is the peace of mind of all
13 of us. That's all. Thank you.

14 THE COURT: Thank you, Miss Gonzalez.

15 MR. HUTH: There's a family friend who would like to
16 talk.

17 THE COURT: Sure. Ma'am, could you give us your name?

18 E L E N A M A Z Z A, SWORN.

19 THE COURT: You were there for almost the whole trial,
20 right?

21 MS. MAZZA: Yes. Your Honor. Yanette was my best
22 friend, my very close, we shared many good times together.
23 March 1981 was supposed to be the happiest time of my life. I
24 share the happiness with Yanette at my wedding. That was the
25 last time I saw her, two weeks before the murders. There

1 aren't enough words to express my feelings for her and the
2 family. Alberto Scabone not only took their lives in a brutal
3 way, but he also took away a piece of all of us.

4 I pray to God all these years that this day would come
5 true. Your Honor, I ask you to give him the maximum sentence
6 allowed by the law, even though that still is not enough to
7 bring them back to us. Thank you.

8 THE COURT: Thank you, Miss Mazza.

9 MR. HUTH: Your Honor, that is the conclusion of my
10 legal comments. I submit that the law is clear, especially
11 dealing with these types of offenses, that consecutive
12 sentences are not only allowed, they're warranted.

13 Regarding the aggravated arson, that is obviously a
14 separate and distinct act because of the separate class of
15 victims involved in that case. There's just one last thing
16 that I have to say here, I just can't imagine, I cannot imagine
17 what these women went through on April the 1st of 1981 when
18 this guy attacked them like that. I can't imagine the horror
19 scene that this guy inflicted on them as they walked into their
20 apartment. I mean, that's just beyond comprehension what that
21 scene must have been like. That had to be the most horrible
22 thing in the world.

23 Judge, this case cries out for justice. This case
24 cries out for the absolute maximum term that the Court can give
25 this guy because he's going to do it again. He's done it

1 before and he has absolutely no remorse, no remorse whatsoever
2 for the deaths of these 3 women. Thank you.

3 THE COURT: Okay. This was, in fact, a 2-week jury
4 trial before this Court. Mr. Scabone was found guilty on count
5 1 to passion provocation manslaughter of the mother-in-law,
6 59-year-old Monica Scabone. On count number 2 he was found
7 guilty of murder, purposeful and knowingly, of a sister-in-law
8 19-year-old Ynette Estevez. Count number 3, he was likewise
9 found guilty of the knowing and purposeful murder of his
10 mother-in-law Norma Estevez on count 1 was passion provocation
11 of his wife Monica Scabone. The fourth and final count,
12 separate charge regarding the fact that a fire was set
13 allegedly to cover the crimes, Mr. Scabone was convicted by the
14 jury of second degree arson.

15 As already indicated, Mr. Scabone now is 40 years of
16 age. This incident goes back many, many years, April 2, 1981.
17 For those not familiar with the facts of the case, Mr. Scabone,
18 shortly after the commission of the offense, fled the United
19 States of America and basically was on the run from law
20 enforcement authorities. An indictment was returned very
21 shortly after the date of the incidents on April 2, 1981, but
22 through the benefit of the Interpol International Police
23 Network, Mr. Scabone was ultimately arrested in Central America
24 and returned to this country shortly before the time of this
25 trial.

1 On April 2, 1981, I totally agree with the jury's
2 verdict, Mr. Scabone did brutally stab and kill his wife Monica
3 Scabone. He then killed, after a passage of time, his
4 mother-in-law and then a 19-year-old Yanette Estevez who had
5 the misfortune of coming home early from school. Each victim
6 was stabbed numerous times, including stab wounds to the back.

7 I think an especially important highlight and piece of
8 evidence for the jury to consider, it was in fact brought out
9 that there was a total of 93 stab wounds allocated among those
10 3 poor victims. It was also brought out during the course of
11 the trial that especially for the victims who were killed after
12 Monica Scabone, in the scenario as the killings were provided
13 by Mr. Scabone's present wife, Miss Elliot Alverado, and she
14 indicated that Mr. Scabone said after killing his wife Monica
15 Scabone, he then lay in wait for his mother-in-law and his
16 sister-in-law.

17 That version of the situation was verified in many
18 respects by the coroner's report indicating that the bodies of
19 Yanette Estevez and Norma Estevez were in fact fully clothed.
20 People were wearing their street shoes and they had
21 windbreakers on. They were fully clothed after just having
22 come in from outdoors into their family apartment which they
23 thought was a safe place and unfortunately for them Mr. Scabone
24 lay in wait for them at that time. And, as a result of that,
25 they were all killed there.

1 After the murders, Mr. Scabone, again in an attempt to
2 flee the scene and to evade arrest, set fire to the family
3 apartment. That's bad enough, number one. But that was a
4 multi-family dwelling at 239 Bloomfield Avenue. That action,
5 not even considering the injuries that possibly could have been
6 sustained by the arriving or responding fire fighters or
7 firemen caught if a floor collapsed at that building, but also
8 was a multiple dwelling with other family members of other
9 tenants living in that building.

10 Mr. Scabone, during the course of the trial as he
11 shown on April 2, 1981, had no remorse on April 2 for anybody.
12 And he had no remorse for anybody even up to and including the
13 present day. In fact, during the course of his
14 cross-examination on the stand Mr. Scabone, I can't recount the
15 number of times Mr. Scabone laughed.
16 He thought he was having a good time here testifying in his own
17 behalf.

18 Mr. McLaughlin did an excellent job and so did Mr.
19 Huth, for that matter, but Mr. McLaughlin gave him a million
20 dollars defense in this case. The only person, Mr. Scabone is
21 looking for someone to blame for a guilty verdict in this case
22 is his own testimony from the witness stand because if anybody
23 sunk his own ship, Mr. Scabone did an admirable job in front of
24 the jury laughing and joking his way to a long custodial
25 sentence and he will have a long time to think about what he

1 did during the course of this trial and what he did back in
2 1981.

3 There obviously is a presumption of incarceration. We
4 have 3 separate deaths. These are first degree offenses and
5 also second degree offenses. I'm familiar with all the facts
6 of the case. I've also reviewed Mr. Scabone's eligibility for
7 release on parole. The mitigating factors that do apply, I
8 agree with Mr. McLaughlin, we heard mention during the course
9 of the trial that Mr. Scabone has been involved with a number
10 of international law enforcement bodies and a number of
11 different countries. But, not one iota of proof has been
12 presented in the way of certified abstract. So as for as I'm
13 concerned, Mr. Scabone has no prior record.

14 Obviously Mr. Scabone's conduct is the result of
15 circumstances unlikely to reoccur. That's an obvious one when
16 the victims are deceased. They're never going to be back on
17 this earth with us again. In regard to mitigating factor
18 number 11, Mr. Scabone has a kidney medical problem which will
19 require attention in the institution, but that's something that
20 can be addressed during his incarceration.

21 In regard to the aggravating factors, I am mindful of
22 the double counting requirement and criteria. So for these
23 reasons, I'm not going to count in aggravating factor numbers 1
24 and 2 on our list concerning circumstances being heinous and
25 cruel involving the stab wounds. Likewise, in fact, with

1 Monica Estevez had been stabbed a number of times and that his
2 mother-in-law Norma was 59 years of age.

3 Again, I don't want to be accused of double counting
4 any of the factors, so this sentence is not in any way based on
5 aggravating factor number 1 or 2. Number 3, obviously the risk
6 that Mr. Scabone will commit another offense. I think the
7 likelihood is extremely high, if not a hundred percent certain
8 that that aggravating factor applies to this case. Aggravating
9 factor number 6, the seriousness of the offense.

10 We have 3 separate victims plus the arson. So, easily
11 other people could have been injured as a result of Mr.
12 Scabone's conduct other than the 3 individuals of his own
13 family who in fact were brutally murdered by him. And,
14 aggravating factor number 9, the need for deterrence.

15 The fact that 3 human lives are lost, I don't think
16 needs to be stated anymore on the record that that obviously is
17 conduct that someone cannot incur. It's clear that the
18 aggravating factor clearly preponderate and I'm clearly
19 convinced that those aggravating factors substantially outweigh
20 the mitigating factors requiring consecutive discretionary
21 minimum terms on this case. There's no Graves aspects to this
22 case for a number of reasons, but including the fact that
23 there's no operable weapon, it was a knife that was utilized.

24 At the time of the commission of the crime it was
25 already pointed out by Mr. McLaughlin in April of 1981 the code

1 of criminal justice was different than it is today. The murder
2 statute, at that time, provided that murder is a crime of the
3 first degree. But a person convicted of murder may be
4 sentenced by the Court, number 1, to a term of 30 years of
5 which the person must serve 15 years before being eligible for
6 parole. Or number 2, as in the crime of the first degree,
7 except that the maximum term for such a crime of the first
8 degree shall be 30 years.

9 I've also reviewed the sentencing guidelines of State
10 vs. Yarborough. We've had a recent legislative change in the
11 Yarborough rule, but that legislative bill did not address
12 whether it would apply retroactively or prospectively. So
13 rather than look for an appealable issue, I'm going to consider
14 that Yarborough still applies to this situation, even though
15 that statute is no longer in effect and I am sentencing Mr.
16 Scabone in accordance with the Yarborough guidelines.

17 Those guidelines are, number 1, that there are no free
18 crimes in this system for which the punishment should fit the
19 crime. Number 2, the reasons for imposing either consecutive
20 or concurrent sentences should be separately stated on the
21 record in our decision. And some of the reasons to be
22 considered by the Court should include facts relating to the
23 crimes including under Subsection A, the crimes and their
24 objectives were predominantly independent of each other. B,
25 that the crimes involved separate acts of violence or threats

1 of violence. C, the crimes were committed at different times
2 or separate places rather than being committed so closely in
3 time and place as to indicate a single period of aberrant
4 behavior.

5 Had any of the crimes involved multiple victims, E,
6 the convictions for which the sentences are to be imposed are
7 numerous. And number 4, there should be no double counting the
8 aggravating factors. Number 5, successive terms for the same
9 offense should not ordinarily be equal to the punishment for
10 the first offense. And number 6, there should be an overall
11 outer limit on the accumulation of consecutive sentences for
12 multiple offenses not to exceed the sum of the longer terms
13 that could be imposed for the 2 most serious offenses.

14 Although Mr. Scabone's offenses may be construed as
15 being committed so closely in time and place as to indicate a
16 single period of aberrant behavior as recommended by Mr.
17 McLaughlin, even conceding that point, if in fact it does
18 exist, and I don't concede that fact because of the time
19 periods in between the arrival of the separate victims into
20 that apartment, these circumstances are vastly outweighed by
21 the fact that these offenses involved numerous multiple
22 victims. And separate and distinct the acts of violence,
23 including what I characterize as the execution style murders of
24 2 totally innocent family members who had absolutely no contact
25 with the initial dispute that arose into the stabbing of Monica

1 Scabone and the passion provocation manslaughter of Mrs.
2 Scabone, as well as the second degree arson on the multiple
3 family dwelling.

4 What is clear is the crimes committed were
5 predominantly independent of one another and they involved
6 separate acts of violence. And it was likewise apparent from
7 the trial proofs that all 3 victims were fully clothed and
8 stabbed to death individually at different times as they
9 entered the apartment. The fire was then set after all of the
10 deaths had been completed to conceal the evidence and to assist
11 Mr. Scabone in making his get away.

12 And just because Mr. Scabone went into some of the
13 facts, I'd like to go into some of the facts in case this does
14 go up on appeal.

15 Mr. Scabone is trying to give the impression that he
16 didn't know what was going on, he panicked, he just acted
17 irrationally. But Mr. Scabone knew enough to get his passport.
18 He knew enough to pack his suitcase. He knew enough to take
19 his t.v. set. He knew enough to get his son Tito's passport.
20 He knew enough to get up to the place of employment to get his
21 last pay check.

22 He knew enough to have his friends cover for him at
23 work so no one would be looking for him. He knew enough to
24 check his former travel agent to try to get the cheapest flight
25 out of the country. He knew enough to try to contact family

1 members in Florida to see if he could try to get to Costa Rica
2 by going down through Florida.

3 So he was in a panic all right and showed such remorse
4 that 6 or 7 days later he is basically trying to date another
5 woman in the Square at Mexico City. And he's deeply in remorse
6 for the loss of his family, 7 days later he's starting up a new
7 family acquaintance who he ultimately married, Mrs. Alvarado
8 Estevez who was here during the course of the trial. So that's
9 the mind set so the Appellate Division is also aware of all of
10 those factors when this case goes up on appeal.

11 The primary criteria for the severity of punishment
12 obviously is the gravity of the defendant's crimes here. They
13 don't come any higher. We have, with the loss of 3 human
14 people, their lives, all their careers, everything that they
15 had going for them. The wounds were extensive. We saw the
16 doctor, Dr. Tambor, he testified that there was over 90 stab
17 wounds. Arson, the multiple dwelling absolutely no concern for
18 the safety of anybody else in that building, including the
19 firemen or any of the other tenants. His only thought was just
20 to get away as clean as he could and try to get out of the
21 country before anyone found out what was going on.

22 My primary rule is as the extent of Mr. Scabone's
23 brutality and violence rises, obviously so too should the
24 number of years that Mr. Scabone is locked up so he can't do
25 anymore damage to the community.

1 So, it is therefore the intent of this Court by these
2 consecutive sentences with parole ineligibility terms that Mr.
3 Scabone be sentenced to the maximum possible sentence allowed
4 by the law and this is the only way that society can be
5 protected and justice can be served.

6 So, on count number 2, the purposeful and knowing
7 murder of Ynette Estevez, I'm committing Mr. Scabone to the
8 Commissioner for a term of 30 years with a 15-year period of
9 parole ineligibility and violent crime penalty of \$30 under the
10 old statute. I am, on count number 3, the purposeful and
11 knowing murder of Norma Estevez, his mother-in-law, the woman
12 who loaned him money all the time so he would utilize that
13 money during the course of his daily life and he paid her back
14 by stabbing her to death, he's committed to the custody of the
15 Commissioner of the Department of Corrections for a term of 30
16 years with a 15-year period of parole ineligibility. This
17 sentence to run consecutively to count number 2. Another
18 violent crime penalty of \$30.

19 On count number 1, the passion provocation
20 manslaughter of his wife, at the time, Monica Scabone, I'm
21 committing Mr. Scabone to the custody of the Commissioner for a
22 term of 10 years with a 5-year period of parole ineligibility
23 to run consecutive to counts 2 and 3. Violent crime penalty of
24 \$30. And on count number 4, the second degree arson, you're
25 committed, likewise, to the custody of the commissioner for a

1 term of 10 years with a 5-year period of parole ineligibility,
2 to run consecutive to counts 1, 2 and 3. And violent crime
3 penalty \$30.

4 Just so the judgment of conviction is clear, all
5 sentences to run consecutive to each other. No sentence is to
6 run concurrent. Everything is to run consecutive to each
7 other. Aggregate total is 80 years in prison, 40 years without
8 parole. I'm committing Mr. Scabone, if he makes it through
9 prison, will be 80 years of age when he is released from
10 prison.

11 Mr. Scabone, there was no death penalty, just so the
12 family members know, that was in effect at that time.
13 Likewise, the sentencing statute was amended but it was after
14 Mr. Scabone's date. So I know one of the family members asked
15 for death penalty. This is not a death penalty case.

16 Mr. Scabone, you've got 45 days from today's date to
17 appeal the sentence. If you can't afford a lawyer, one will be
18 assigned to represent you upon application to the court free of
19 charge. Do you understand that you have that right, Mr.
20 Scabone, if you want to appeal? Mr. McLaughlin has already
21 informed the Court that he is going to file all the paperwork
22 that you're concerned about for that appeal on counts 1, 2 and
23 3.

24 MR. SCABONE: Yes.

25 THE COURT: You've got 336 days jail credit. There's

1 no dismissal on this account. And Mr. Scabone, just based on
2 the fact that a search was done down on the jail floor today
3 and I think certain items of weapons were recovered from your
4 person, I'm just advising you, don't make any statements, but
5 I've been informed that the Prosecutor's Office is going to
6 file formal complaints against you arising out of the incidents
7 that occurred down in the holding cell area for this morning.

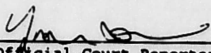
8 So, if we get those complaints, we can address them.
9 I didn't consider them for today's proceeding because I don't
10 know what they totally involve.

11 (The proceeding is concluded.)

12 *****

13 C E R T I F I C A T E

14
15 I, YVONNE DAVION, CSR, License Number XI01280, an Official
16 Court Reporter in and for the State of New Jersey, do hereby
17 certify the foregoing to be prepared in full compliance with
18 the current Transcript Format for Judicial Proceedings and is a
19 true and accurate transcript of my stenographic notes taken in
20 the above matter to the best of my knowledge and ability.

21
22  , CSR
23 Official Court Reporter
24 Rm. 111 Essex County Courts Bldg.
25 Newark, New Jersey.

Date: 7-5-94

Hon. Eugene J. Codey, Jr. J.S.C.

ALBERTO SCABONE #258208-SBI#904520-A
New Jersey State Prison
P. O. Box 861
Trenton, New Jersey 08625
Defendant-Movant, Pro Se

PRESENTLY CONFINED

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-ESSEX COUNTY

INDICTMENT NO.-4225-08-80

STATE OF NEW JERSEY, :

Plaintiff-Respondent, :

- VS. - :

ALBERTO SCABONE, :

Defendant-Movant. :

CRIMINAL ACTION

- O R D E R -

TRUE COPY

WITH THIS MATTER, having been opened to the Court on motions related to the letter brief filed by ALBERTO SCABONE, the defendant appearing pro se and with the Court having considered the letter brief and appendix submitted and with the ESSEX COUNTY PROSECUTOR appearing on behalf of the State and with the Court having considered the arguments presented with good cause appearing to the satisfaction of the Court,

IT IS HEREBY ORDERED on this _____ day of _____, 2004, that defendant's motion to correct an illegal sentence pursuant to R. 3:22-12 is:

-----GRANTED

-----DENIED

ORDER

PAGE TWO

FOR THE COURT:

Judge of the Superior Court

4

Hon. Eugene J. Codey, Jr. J.S.C.

ALBERTO SCABONE #258208-SBI#904520-A
New Jersey State Prison
P.O. Box 861
Trenton, New Jersey 08625
Defendant-Movant, Pro Se

PRESENTLY CONTINUED

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-ESSEX COUNTY

Indictment No.-4225-08-80

STATE OF NEW JERSEY, :
 :
 Plaintiff-Respondent, :

CRIMINAL ACTION

- VS. -


CERTIFICATION OF SERVICE

ALBERTO SCABONE, :
 :
 Defendant-Movant. :

I, ALBERTO SCABONE, undersigned defendant-movant in the above captioned matter hereby certify on this date at New Jersey State Prison, located at Trenton, New Jersey, I placed a copy of my notice of motion to correct an illegal sentence, letter-brief and appendix in support of motion, and proposed order in the ordinary mail with postage prepaid addressed to:

PAULA TOMAYSHU DOW
Acting Essex County Prosecutor
Essex County Court Building
50 West Market Street
Newark, New Jersey 07102

DATED: 9/11/04 2004


ALBERTO SCABONE
MOVANT, PRO SE

Hon. Eugene J. Coday, J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ESSEX COUNTY

Indictment No. 6225-08-80

STATE OF NEW JERSEY,

Plaintiff-Respondent,

- VS. -

ALBERTO SCABONE,
Defendant-Movant.

CRIMINAL ACTION

On Motion to Correct
An Illegal Sentence

Motion Brought Pursuant To:

R. 3:22-12.

APPENDIX ON BEHALF OF DEFENDANT-MOVANT.

ALBERTO SCABONE #258208
SBI#940520-A
New Jersey State Prison
Post Office Box 861
Trenton, New Jersey 08625

PRESENTLY CONFINED

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ALBERTO SCABONE #258288-SBI#940520-A
New Jersey State Prison
P. O. Box 861
Trenton, New Jersey 08625

Defendant-Movant, Pro Se

September 13, 2004

HONORABLE EUGENE J. CODEY, JR. J.S.C.
Superior Court of New Jersey
Essex County Courts Bldg.
50 West Market Street
Newark, New Jersey 07102

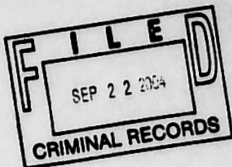
Re: State vs. Alberto Scabone
Motion to Correct an Illegal Sentence
Essex County Ind. #4225-08-80

Dear Judge Codey:

Please accept this letter-brief in lieu of a more formal brief in support of defendant's Scabone motion to correct an illegal sentence relative to indictment number 4225-08-80.

THE TRIAL COURT VIOLATED DEFENDANT'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS AND HIS RIGHT TO A JURY TRIAL WHEN IT SENTENCED HIM TO CONSECUTIVE MAXIMUM TERMS, INCLUDING DISCRETIONARY PERIODS OF PAROLE INELIGIBILITY, BASED UPON FACTS NEITHER ADMITTED BY DEFENDANT NOR FOUND BY THE JURY.

Defendant was convicted of two counts of murder, one count of manslaughter and one count of second-degree arson. The sentencing court, in imposing consecutive terms for the murder (30 years with a 15-year parole disqualifier for each) the manslaughter (10 years with a five-year parole disqualifier), and the second-degree arson (10 years with a five-year parole disqualifier) the maximum possible sentence allowed by law in 1981.



At the time of the offenses, defendant, as a convicted murderer was subject to the following: (1) to a term of 30 years of which the person must serve 15 years before being eligible for parole, or (2) as in a crime of the first degree except that the maximum term for such a crime of the first degree shall be 30 years." N.J.S.A. 2C:11-3(b). Defendant received the maximum term. (8T37-1 to 4).¹ That sentence is illegal and must be vacated.

In addition to the maximum sentence for murder, defendant received the maximum term of 10 years with a 5 year parole bar on the second degree conviction of arson, to run consecutive to the murder. (8T37-24 to 38-2). Judge Cooby did not merge none of the convictions with the murder convictions. (8T38-4 to 7). As discussed below, like the murder sentence, the term imposed on the arson conviction is also illegal and must be vacated.

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¹"8T" refers to defendant's sentencing transcripts made a part hereof in defendant's appendix marked 8T1 to 39.

The sentencing court found one mitigating factor: factor (1) Mr. Scabone has no prior record. However, the sentencing court found three aggravating factors: factor (3) the risk that defendant might commit another offense; factor (6) the seriousness of the offense; and factor (9) the need for deterrence. (ST31-3 to 32-14).

None of the aggravating factors were reflected in the jury verdict nor admitted by the defendant. Rather, they were all found by the judge, by a preponderance of the evidence. See State v. O'Donnell, 117 N.J. 210, 215 (1989) (sentencing factors need only be found by a preponderance of the evidence). The judge determined that the aggravating factors outweighed the mitigating, and, as noted, imposed the maximum term of life, and the mandatory 30-year parole bar.

On June 24, 2004, the United States Supreme Court decided Blakely v. Washington, 124 S.Ct. 2531 (2004), which involves the Washington State sentencing scheme. The defendant in Blakely having pleaded guilty to a class B felony, faced a statutory presumptive range of 49-53 months and a maximum term of 120 months. The sentencing judge found aggravating facts, and imposed 90 months. Id. at 2535. Although the sentence was less than the maximum term, the Supreme Court found it unconstitutional.

The Court held that, under the Sixth Amendment, the jury, rather than the judge, had to find beyond a reasonable doubt any fact that increased the sentence above the presumptive 49-53 months. Id. at 2537.

The Supreme Court pointed out that its holding in Blakely was governed by its earlier decision in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), which held:

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

The Blakely Court concluded that, for Apprendi purposes, the relevant statutory maximum "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 2537.

The Court noted that, under Washington law, the judge could not have increased the sentence beyond the presumptive 49-53 months based solely on the facts the defendant admitted in the guilty plea. In order to increase the sentence, the judge had to take into account facts other than those which were used to compute the standard range. Id. at 2537-38. The Court observed, "Had the judge imposed the [enhanced] sentence solely on the basis of the plea, he would have been reversed." Id. at 2538; United States v. Booker, ___ F.3d ____, 2004 WL 1535858

at *4 (7th Cir. July 16, 2004) federal sentencing guidelines unconstitutional insofar as "they limit defendants' right to jury and to the reasonable-doubt standard"); United-States v. Croxford, ---- F.Supp.2d ----, 2004 WL 1521560 (D. Utah July 7, 2004) (same), adhered to by United-States v. Croxford, ---- F.Supp.2d ----, 2004 WL 1551564 (D. Utah July 12, 2004).

Similarly, if the judge had ordered defendant to serve the maximum life term without making any factual findings, this Court would have had to vacate the sentence. See, State v. Glover, 230 N.J. Super. 333, 344 (App. Div. 1988) (affirming life term for murder on ground that there was ample support for aggravating factors judge relied on); State v. Serrone, 95 N.J. 23, 25 (1983), citing State v. Maquire, 84 N.J. 508, 526 (1980), (life sentence for murder could be imposed upon consideration of aggravating factors); see also State v. Roth, 95 N.J. 334, 364 (1984) (reviewing court must determine whether cited aggravating and mitigating factors are based on competent, credible evidence).

Sentencing under the Criminal Code is governed by the principle of uniformity with the goal of avoiding disparity. See State v. Brimage, 153 N.J. 1, 22-23 (1998); State v. Vasquez, 129 N.J. 189, 203 (1992). Accordingly, like the Washington system at issue in Blakely, the Code sets forth sentencing

ranges and presumptive terms and requires courts to weigh specified aggravating and mitigating factors before imposing sentence above or below the presumptive term, and also spells out the circumstances in which courts can impose extended terms and periods of parole ineligibility. See o.g. 2C:43-6; 2C:43-7; 2C:44-1a, b, f(1). While the Code does not prescribe a presumptive term for murder, 2C:44-1(f), the statutory minimum term of 30 years is, effectively, the presumptive term for murder: the court could not increase defendant's sentence beyond 30 years based solely on the jury verdict.

The carjacking statute provides a useful analogy. Like murder, carjacking has a minimum and maximum term covering a wide range, but no presumptive term. In State v. Iadovan, 290 N.J. Super. 280, 290 (App. Div. 1996), the Appellate court emphasized the need for a presumptive term "to guide imposition of a carjacking sentence beyond the mandatory minimum" and to serve as "a benchmark which may be adjusted upward or downward depending on (the court's) evaluation and balancing of the aggravating and mitigating factors." Accordingly, the court identified the minimum sentence as the presumptive term for carjacking, and required the sentencing judge to make findings of fact to justify a sentence above the presumptive. Id.; accord State v. Barardi, 369 N.J. Super. 445 (App. Div. 2004); State

v. Henry, 323 N.J. Super. 157 (App. Div. 1999). In short, the 30-year minimum is the presumptive term for murder, and the sentencing judge must find aggravating factors in order to increase the sentence above 30 years. Because all three aggravating factors the judge relied on to increase defendant's sentence were found by the judge by a preponderance of the evidence, and not by the jury beyond reasonable doubt, the eighty year term with a forty year parole bar imposed upon defendant violates his state and federal constitutional rights to trial by jury and due process of law, and therefore, must be reversed. U.S. Const., amends. VI, XIV; N.J. Const., art I, §§ 1, 10.

Defendant was also convicted of the second-degree charge of arson. The Code expressly states that the presumptive term for a second-degree offense is seven years. 2C:44 1f(1)(c). Defendant received a consecutive maximum term of 10 years with a discretionary five year period of parole ineligibility. (8T37-24 to 38-3).

In imposing the maximum term, the judge relied on aggravating factors, (3), (6) and (9), the same factors he cited in support of his decision to impose the maximum term on the murder conviction. None of those factors were reflected in the jury's verdict or admitted by defendant. Thus, for the same reason that imposition of the maximum term on the arson

conviction violates defendant's state and federal constitutional rights to trial by jury and due process, and must be vacated.

Furthermore, under N.J.S.A. 2C:44-6b, the only way a discretionary parole bar may be imposed is if the sentencing judge is "clearly convinced" that the aggravating circumstances "substantially outweigh" the mitigating. See State v. Bayless, 114 N.J. 169, 179 (1989); State v. Williams, 310 N.J. Super. 92, 98 (App. Div. 1998)(even when imposing a mandatory extended term, a trial court must not impose a discretionary parole disqualifier without first finding that the aggravating factors substantially outweigh the mitigating factors).

In imposing a minimum term pursuant to 2C:43-6b, the sentencing court shall specifically place on the record the aggravating factors ... which justify the imposition of a minimum term," 2C:44-1f(1), and its "reasons for imposing sentence, including ... consideration of the defendant's eligibility for release under the law governing parole ..." State v. Kruse, 105 N.J. 354, 359 (1987).

In addition to its findings on the various aggravating and mitigating factors, the sentencing court must "describe the balancing process" and "explain how it determined defendant's sentence." State v. Kruse, 105 N.J. at 360. See also State v. Sainz, 107 N.J. 283, 290 (1987)(rejecting State's argument

that three year mandatory minimum "encompassed an implicit finding and weighing of aggravating and mitigating factors;" resentencing ordered); State-v.-Vitale, 102 N.J. 350 (1985) (mem.)(remanded for resentencing because "the sentencing transcript does not reveal an articulation of balancing of aggravating and mitigating factors required to establish the base or parole ineligibility terms"); State-v.-Bessix, 309 N.J. Super. 126, 129-30 (App. Div. 1998)(describing the "three-step process" that must be followed before imposing a mandatory minimum sentence; and remanding because of the trial court's failure to "sufficiently articulate on the record its reasons for imposing a period of parole ineligibility...").

Thus, just as the "standard" sentence in Blakely could not be exceeded without a finding of certain factors in aggravation, the sentence in this case cannot exceed the presumptive nor can a parole bar be imposed without such findings. See Ring-v.-Arizona, 536 U.S. 584, 612, 122 S.Ct. 2428, 2445 (2002)(Scalia, J., concurring) ("whenever [aggravating] factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.")(Emphasis added).

Additionally, in New Jersey the decision of whether or not to impose consecutive or concurrent sentencing is based on judicially established guidelines rather than by statute.²

In State v. Yarbough, 100 N.J. 627 (1985), cert denied, 475 U.S. 104 (1986) the Court established the following criteria to be followed when sentencing for multiple offenses at the same time:

- (1) there can be no free crime . . .
- (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
- (3) ...the sentencing court should [consider] ... whether or not:
 - (a) the crimes and their objectives were predominantly independent of each other;
 - (b) the crimes involved separate acts of violence or threats of violence;
 - (c) the crimes were committed at different times or separate places, rather than being committed so closely in time as to indicate a single period of aberrant behavior;
 - (d) any of the crimes involved multiple victims; [and]
 - (e) the convictions for which the sentences are to be imposed are numerous;
- (4) there can be no double counting of aggravating factors;
- (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and

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N.J.S.A. 2C:12-13; 2C:13-1c(2); 2C:35-4.1; 2C:39-4.1d all require the sentence be served consecutive. N.J.S.A. 2C:44-5(3),(c), f(2)(3), (h) and (i) require the sentence be served consecutively, unless the court in its discretion concludes otherwise.

(6) there should be an overall limit on the cumulation of consecutive sentence for multiple offenses not to exceed the sum of the longest terms (including an extended term if eligible) that could be imposed for the two most serious offenses.

Id., 100 N.J. at 643-44 (footnote omitted). The Yarborough criteria has been carefully enforced and where a sentencing court has failed to follow them, court's of review have reversed or remanded for new sentencing proceedings. See State--v.-Carey, 168 N.J. 413, 424 (2001)("When a trial court fails to give proper reasons for imposing consecutive sentences at a single sentencing proceedings, ordinarily a remand should be required for resentencing"); State-v.-Miller, 108 N.J. 112, 122 (1987)(Court found it "was compelled" to remand for resentencing where trial court had failed to give separate statement of reasons for imposing consecutive sentences); State-v.-Cook, 330 N.J. Super.

395, 423 (App. Div. 2000)(a remand is ... necessary for the sentencing judge to give a separate statement of reasons for the imposition of consecutive terms to enable us to determine whether the imposition of consecutive sentences was a proper exercise of discretion").

Indeed, not too long ago, our Supreme Court addressed the concurrent/consecutive sentencing decision thusly: "A trial judge's discretion remains guided by the seminal precepts set forth in State-v.-Yarbough, 100 N.J. 627 (1985)." State-v.-Ellis, 346 N.J. Super. 583, 590 (App. Div.) aff'd 174 N.J. 535 (2002).

Since the Yarbough guidelines are of judicial creation and have the force of law, Blakely applies to this sentencing decision as well. Consequently, inasmuch as the Yarbough guidelines require a judge to make factual findings beyond the facts found by the jury or admitted by the defendant, imposition of a consecutive term violates the right to trial by jury.

Clearly, under Blakely, Apprendi and Ring, a defendant has a right to have a jury, not a judge, make the aggravating factor findings (other than prior record), including the findings in support of imposing consecutive terms, and that right is violated when, as here, a judge makes the findings instead, and consecutive terms exceeding a flat presumptive term are imposed. Accordingly, Blakely, Apprendi, and Ring, limit

HONORABLE EUGENE J. CODEY, JR. J.S.C.
Superior Court of New Jersey
Essex County Courts Bldg.
50 West Market Street
Newark, New Jersey 07102


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defendant's exposure to the "statutory maximum," which in his case is the presumptive seventy years with a thirty-five year parole bar for his murder convictions, and a consecutive maximum term of ten year with a five year parole bar for his arson conviction.

CONCLUSION

For the reasons stated within defendant's Letter-Brief, the Court should vacate his convictions. Alternatively, for the reasons stated within the Letter-Brief the Court must merge his convictions under Count One, Three and Four into Count Two for the reasons stated here, it must find his sentences unconstitutional and either modify them or remand his case for a new sentencing proceedings.

Respectfully submitted,



ALBERTO SCABONE
MOVANT, PRO SE

17533-81
7534-81

Superior Court of New Jersey
ESSEX COUNTY
(Law Division - Criminal)

Filed April 2, 1981

4225-1980 Term

THE STATE OF NEW JERSEY

vs.

ALBERTO SCARONE

Defendant

INDICTMENT (4 Counts)

MURDER & SECOND DEGREE ARSON

A True Bill

.....*Michael P. Hill*.....
Foreman

GRAND JURY NO. 6239 th
6239C

Plea:

Bail:

Presented:

Vol 77942
WG 7794.

Essex County, to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon
their oath present that **ALBERTO SCABONE**

on the 2nd day of April, 1981
at the City of Newark in the County of Essex
aforesaid and within the jurisdiction of this Court, did murder Monica Scabone

contrary to the provisions of N.J.S. 2C:11-3
and against the peace of this State, the government and dignity of the same.

~~Essex County, New Jersey~~

SECOND COUNT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that **ALEJANDRO SCABONE**

on the 2nd day of April, 1981

at the City of Newark

in the County of Essex

aforesaid and within the jurisdiction of this Court, did murder Yarnet Esteves

contrary to the provisions of N.J.S. 2C:11-3

and against the peace of this State, the government and dignity of the same.

~~Essex County Court~~

THIRD COURT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon
their oath present that ALBERTO SCABONE

on the 2nd day of April, 1981
at the City of Newark in the County of Essex
aforesaid and within the jurisdiction of this Court, did murder Norma Esteves

contrary to the provisions of N.J.S. 2C:11-3
and against the peace of this State, the government and dignity of the same.

Da 4

~~Essex County Court~~

FOURTH COURT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that **ALBERTO SCABIE**

on the 2nd day of April, 1981
at the City of Newark in the County of Essex
aforesaid and within the jurisdiction of this Court, did purposely destroy an
occupied multiple family dwelling at 239 Bloomfield Avenue, Newark, N.J.

contrary to the provisions of N.J.S. 2C:17-1a.(2), a crime of the Second Degree
and against the peace of this State, the government and dignity of the same.

GEORGE L. SCHNEIDER
COUNTY PROSECUTOR
BY: **rls**

Do. 45

State of New Jersey

New Jersey Superior Court

ESSEX County

Law Division - Criminal

v.

ALBERTO SCABONE

Defendant (Specify Complete Name)

- Judgment of Conviction
 Change of Judgment
 Order for Commitment
 Indictment/Accusation Dismissed
 Judgment of Acquittal

11/5/53

DATE OF BIRTH

904520A

SSN #

2/3/93

DATE OF ARREST

4/2/81

DATE IND / ACC FILED

11/18/93

DATE OF ORIGINAL PLEA

ORIGINAL PLEA

NOT GUILTY GUILTY

ADJUDICATION BY

DATE

GUILTY PLEA

11/18/93

JURY TRIAL

NON-JURY TRIAL

Dismissed/ Acquitted

ORIGINAL CHARGES

IND / ACC No

Count

Description

Grade

Statute

4225-8-80

1

Murder

1st

2C:11-4b(a)

" " "

2

Murder

1st

2C:11-3

" " "

3

Murder

1st

2C:11-3

" " "

4

Arson

2nd

2C:17-1a(2)

FINAL CHARGES

Count

Description

P.C. Grade Statute

Same as above

PAROLE

It is, therefore, on 1/16/94 ORDERED and ADJUDGED that the defendant is sentenced as follows

Ct. #2 - Commit to the Commissioner of the Department of Corrections for the term of thirty years of which he must serve fifteen years before being eligible for parole.

Ct. #3 - Commit to the Commissioner of the Department of Corrections for the term of thirty years of which he must serve fifteen years before being eligible for parole consecutive to Ct. #2.

Ct. #1 - Commit to the Commissioner of the Department of Corrections for the term of ten years of which he must serve five years consecutive to Cts. #2 &

Ct. #4 - Commit to the Commissioner of the Department of Corrections for the term of ten years of which he must serve five years consecutive to Cts. #2, 3

It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority

Defendant is to receive credit for time spent in custody (N.J.S.A. 2:21-8)

336 days

2/3/93 to

PERIOD OF

DATE OF

1/16/94

DATE OF

Defendant is to receive good time credit for time spent in custody (N.J.S.A. 2C:44-5a2b)

PERIOD OF

DATE OF

Total Custodial Term 30 yrs. Institution Dept. of Corrections / Total Probation Term _____

Administrative Office of the Courts
 State Bureau of Identification

LF0103 (Rev. 1-22-93) (Form No. 100-100-1)

COPIES TO: CHIEF PROBATION OFFICER STATE POLICE AOC CRIMINAL PRACTICE DIVISION DEPT OF CORRECTIONS OR COUNTY PENAL INSTITUTION

State of New Jersey v _____

SBI # _____

IND ACC # _____

Total FINE \$ _____

Total RESTITUTION \$ _____

If the offense occurred on or after December 23, 1991 an assessment of \$50 is imposed on each count on which the defendant was convicted unless the defendant indicates a higher assessment pursuant to N.J.S.A. 2C 43-2.1. (Assessment is \$25 if offense is on or after January 9, 1990 but before December 23, 1991, unless a higher penalty is noted. Assessment is \$25 if offense is before January 9, 1990.)

Assessment imposed on _____
 court(s) 1, 2, 3, 4
 @ \$ 30.00 each.

Total VCCB Assessment \$ 90.00

Installment payments are due at the rate
 of \$ _____ per _____
 beginning _____ (DATE)

If any of the offenses occurred on or after Jan. 28 of this year

987, and is for a violation of Chapter 35 or 36 of Title 17C

- 1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. Write in # times for each:
- 1st Degree @ \$3000 4th Degree @ \$750
 - 2nd Degree @ \$2000 Disorderly Persons or Petty
 - 3rd Degree @ \$1000 Disorderly Persons @ \$500

Total D.E.D.R. Penalty \$ _____

- Court further ORDERS that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program

2) A forensic laboratory fee of \$50 per offense is ORDERED _____ Offenses @ \$50
 Total LAB FEE \$ _____

3) Name of Drugs Involved _____

4) A mandatory driver's license suspension of _____ months is ORDERED
 The suspension shall begin today, _____ and end _____
 Driver's License Number _____

(If THE COURT IS UNABLE TO COLLECT THE LICENSE PLEASE ALSO COMPLETE THE FOLLOWING.)

Defendant's Address _____
 Eye Color _____ Sex _____ Date of Birth _____

The defendant is the holder of an out of state driver's license from the following jurisdiction _____ Driver's license # _____

Your non-resident driving privileges are hereby revoked for _____ Months.

If the offense occurred on or after February 1, 1993 and the sentence is to probation or to a State Correctional facility, a transaction fee of up to \$1.25 is entered for each session when a payment or installment payment is made. (P.L. 1992, c. 169)

NAME (Court Clerk or Person who prepared this form)

TELEPHONE NUMBER

NAME (Attorney for Defendant or Sentencing)

TERRY MONTEMURRO (201) 621-4805

Kevin McLaughlin, Esq.

STATEMENT OF REASONS

The aggravating factors are the risk that the defendant will commit another offense, the seriousness of the offenses of which he has been convicted; and the need for deterring the defendant and others from violating the law.

The mitigating factors are the defendant has no history of prior delinquency or criminal activity or has had a law-abiding life for a substantial period of time before the commission of the present offense; the defendant's conduct was the result of circumstances unlikely to recur; and the imprisonment of the defendant would entail excessive hardship to himself or his dependents.

HOLIDAY, SNOW & ICE DELAY

JUDGE (Name)

Judge (Signature)

DATE

EUGENE J. CODEY, JR.

Administrative Office of the Courts
State Bureau of Administration

CR-100 (Rev. 1-93) (Replaces CR-100 & CR-100-1)

COPIES TO: CRIM PROBATION OFFICER, STATE POLICE, AOC CRIMINAL PRACTICE DIVISION, DEPT OF CORRECTIONS or COUNTY PENAL INSTITUTION

D: 7

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3498-9374

FILING DATE
APPELLATE DIVISION

STATE OF NEW JERSEY,

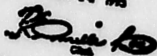
Plaintiff-Respondent,

v.

ALBERTO SCABONE,

Defendant-Appellant.

NOV 14 1995



Submitted: September 19, 1995 - Decided: NOV 14 1995

Before Judges A.M. Stein and Cuff.

On appeal from the Superior Court of New Jersey, Law Division, Essex County.

Susan L. Reisner, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, of counsel and on the brief).

Alberto Scabone, appellant, submitted a supplemental brief **RE: RE**.

Clifford J. Minor, Essex County Prosecutor, attorney for respondent (Elizabeth A. Duelly, Assistant Prosecutor/Director and Barbara A. Rosenkranz, Assistant Prosecutor, of counsel and on the brief and supplemental letter brief).

PER CURIAM

Defendant was found guilty of the passion/provocation manslaughter of Monica Scabone, his wife; of the purposeful and knowing murders of Yvonne Esteves, his sister-in-law, and Yvonne Esteves, his mother-in-law; and of causing another's death. The trial judge announced defendant's sentence of 30 years to life in prison.

eighty years with a forty-year parole ineligibility period; a ten-year prison term with a five-year parole disqualifier for the passion/provocation manslaughter; a thirty-year prison term with a fifteen-year parole ineligibility period for each of the two murders; and a ten-year prison term with a five-year parole ineligibility period for the arson. All terms were to run consecutively. We affirm.

Defendant met and began dating Monica Esteves in his native land of Uruguay. They were married in Newark in April 1978, where they resided in a first floor apartment on Bloomfield Avenue. At the time of the murders, Monica's mother, Norma Esteves, and her 17-year old sister, Yannet Esteves, were sharing the apartment with defendant, Monica and their three-year old son.

At 10:17 p.m., April 2, 1981, the Newark Fire Department answered a fire alarm call for the apartment. In the bedroom, firefighters discovered the severely burned, fully clothed bodies of Monica, Yannet and Norma. Autopsies revealed their deaths were not caused by the fire, but from massive internal bleeding caused by multiple stab wounds. Approximately 90 stab wounds were inflicted, many in the victims' backs, with Yannet receiving forty-one, Norma thirty-five and Monica approximately fourteen.

Raymond Bischof, then a detective in the Newark Arson Squad, determined that the fire was deliberately started. By the morning after the fire, defendant was considered a suspect and an extensive search for him followed. The police determined with

defendant was no longer in the United States, and sent a copy of the case file to the United States Department of Justice Interpol section in Washington.

Defendant remained unapprehended until twelve years later, when Elieth Alvarado Camacho, defendant's second wife, went to the American Consulate in Guadalajara, Mexico and informed Gilbert Alvarez of the F.B.I. that she believed her husband was Alberto Scabone. Defendant was then arrested and brought to the United States where he was indicted for murder and arson.

Ana Gonzales, Monica's sister, testified that defendant and Monica "fought a lot . . . about anything, everything . . . he was very jealous," and that in March 1980, she saw defendant hit Monica in the back with a bottle during a fight, then heard him threaten to burn their house down. She also testified that while visiting defendant's parents in Uruguay in January 1981, she heard defendant tell Monica during a fight that "he was going to kill her and the whole family like he . . . always told her." Gonzales testified that she had heard defendant threaten to kill Monica "many times" and that although he "always" threatened to burn down the apartment, she never believed him.

Leopoldo Silva, Monica's brother-in-law, testified that defendant once told him "one day I'm going to kill those three crazy women," referring to Monica, Yannet, and Norma who were in another room. When Silva smiled at this statement, defendant said "you're laughing. I'm talking seriously." Silva testified

that defendant said he would go to Mexico or Uruguay after killing the women.

Camacho testified she first met defendant and his son in a Mexico City park the weekend before Easter of April 1981. Defendant told Camacho he was a widower and asked for her home phone number in Costa Rica. Defendant went to Costa Rica and began dating Camacho, who then knew him as Marguerito Ramirez Rodriguez. He told her that his wife, sister-in-law, and mother-in-law had died in a car accident in the United States. Thereafter, defendant and Camacho married and moved to Mexico.

Camacho testified she and defendant began having marital problems due to defendant's jealousy. Camacho tried to leave him on several occasions. Each time he followed her and each time she took him back. Camacho and defendant returned to Costa Rica.

Camacho first became suspicious of defendant when his parents came to visit. She discovered their names were listed on the plane tickets as Scabone, not Ramirez Rodriguez. Camacho later learned defendant was wanted for the three murders. She did not learn how the women were killed. While defendant was in prison in Costa Rica for an unrelated matter, Camacho contacted Interpol to verify the information and requested they not publish her name. They did not honor her request and she moved back to Mexico. Several months later, defendant found Camacho in Mexico and she allowed him to return to her.

According to Camacho, it was during this time that defendant threatened to kill her, her mother and her sister.

Camacho testified she told defendant that she knew about the deaths of his ex-wife and her family. She said "you're going to do the same thing that you did that one day" and he replied "if I have to do it, I'm going to do it again."

He later told Camacho that he had been fighting with his first wife when she grabbed a knife they kept above their bed. He said that he took it from her, wounded her with it, panicked and killed her. He then waited for Monica's mother and sister to come home and killed them as they separately arrived at the apartment.

Camacho went to the Mexican police. Because they did not seem interested in her story, she went to the American Embassy in Guadalajara and spoke to Gilbert Alvarez. When she met with Alvarez a second time, she revealed defendant's confession. Defendant was ultimately taken into custody.

Defendant asserted his innocence at trial. He testified that on the day of the murders he played soccer with some friends until 5:30 or 6:15 p.m. He returned home briefly and then went to Elizabeth with two friends. According to defendant, he returned home around 9:40 p.m.

Defendant testified that when he entered the apartment, the apartment was on fire and splattered with blood. He tried to put out the fire with some milk. According to defendant, "[e]verything was thrown around," there were "broken cigarettes," and the apartment "smelled like gas." He testified he found the three women in the bedroom. After touching them he said he was

dead, he grabbed his son and left. Shortly thereafter, he fled with his son to Mexico.

Defendant denied threatening to burn the house down. He explained that when he said he would "kill" Monica, it was "just an expression." On cross-examination, he added, "I just--I say that when I'm going to make love, too. The French say it when they make love also. That doesn't mean you're going to kill."

Defendant raises the following contentions in his main brief on appeal:

- POINT I - THE ADMISSION OF OTHER CRIMES, WRONGS OR ACTS EVIDENCE CONSTITUTES REVERSIBLE ERROR.
- A. The Ana Gonzalez-Leopoldo Silva Testimony.
 - B. The Elieth Canache Alvarado Testimony.
- POINT II - THE ADMISSION OF THE INCULPATORY TESTIMONY OF DEFENDANT'S SECOND WIFE, GOVERNED BY AN EX POST FACTO LAW, CONSTITUTES REVERSIBLE ERROR.
- POINT III - DEFENDANT'S SENTENCE WAS MANIFESTLY EXCESSIVE.
- A. Consecutive Terms Should Not Have Been Imposed.
 - B. Parole Disqualifiers Should Not Have Been Imposed.
 - C. Maximum Base Terms Should Not Have Been Imposed.

Defendant raises the following additional contentions in his
SEE 22 supplemental brief:

POINT I -

THE WRITTEN VERDICT DOES NOT COME WITHIN THE INTENT OF THE STATUTE WHICH ENCLOSED THE JURY INSTRUCTIONS

DEFENDANT'S PASSION/PROVOCATION DEFENSE
IN MITIGATION OF HIS GUILT FROM MURDER
TO MANSLAUGHTER (NOT RAISED BELOW).

POINT II - THE VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHT TO BE TRIED ONLY FOR AN OFFENSE FOUND BY THE GRAND JURY. (NOT RAISED BELOW).

POINT III - THE STATE WAS GUILTY OF PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR ERRED IN HIS KNOWINGLY ALLOWING THE FALSE AND PERJURED TESTIMONY OF THE STATE'S KEY WITNESS AT TRIAL AND INFECTED THE TRIAL PROCEEDINGS AND DID INTERFERE WITH THE JURY'S ABILITY TO WEIGH THE TESTIMONY (NOT RAISED BELOW).

We affirm. We find the contentions raised by defendant's ~~RE: RE~~ supplemental brief to be clearly without merit, R. 2:11-3(e)(2), and discuss the issues raised in the main brief.

We reject defendant's contention that the testimony of Gonzalez, Silva and Canacho was inadmissible under N.J.R.E. 404(b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

[N.J.R.E. 404(b).]

The rule excludes such evidence "when offered solely to prove a defendant's propensity to commit crime." State v. Stevens, 115 N.J. 289, 399 (1989). Its purpose is to ensure that defendants are not convicted merely because the other acts give the jury the impression that they are "bad people in general." State v. DiFrizzo, 137 N.J. 434, 498 (1994).

The list of purposes enumerated in N.J.R.E. 404(b) for which other bad-act evidence may legitimately be introduced is "not exhaustive, . . . such evidence is admissible so long as it is relevant to a material issue in dispute and not offered to prove a defendant's disposition." Ibid. (citing State v. Stevens, ANSA, 115 N.J. at 300). When seeking to introduce other crimes evidence, the prosecution must show the evidence meets the four-part test formulated by the New Jersey Supreme Court in State v. Cofield, 127 N.J. 328, 338 (1992): (1) the other wrong must be relevant to a material issue in genuine dispute; (2) it must be similar in kind and reasonably close in time to the offense charged; (3) the evidence must be clear and convincing; and (4) the probative value must not be outweighed by the prejudice to the defendant. Id. at 338.

The trial judge properly permitted Gonzales's and Silva's testimony, ruling that it could be used to show a "continuing enduring hostility between the parties" and to show defendant's intent and motive.

The judge correctly relied upon State v. Ennal, 249 N.J. Super. 336, 372-74 (App. Div.), certif. denied, 130 N.J. 393 (1991). In Ennal, defendant was accused of hiring someone to murder his wife. The trial judge permitted testimony that defendant had a stormy relationship with his wife, that he was extremely jealous of her and that his jealousy "often manifested itself in fits of rage during which he confronted [her] with unfounded suspicions, and verbally and physically abused her."

Id. at 348. The judge permitted the victim's mother to recount two incidents in which the defendant repeatedly struck his wife and accused her of being unfaithful. Ibid.

Defendant contends that because he denied committing the murders, his motive and intent was never in issue. In a homicide case, the State may always, though it need not, prove motive as part of its case-in-chief. See Moran v. Forbes, 24 N.J. 341, 359 (1957). Defendant was charged with the knowing or purposeful murders of the three women. Intent to kill was an integral and necessary part of the State's case.

We agree with the trial judge that the acts testified to by Gonzalez, Silva and Camacho were reasonably close in time to the actual murders as required by State v. Cofield, supra.

In State v. Ransour, 106 N.J. 123, 266 (1987), the New Jersey Supreme Court held "[t]he temporal remoteness of a past wrong affects its probative value." The Court concluded that arguments between defendant and the murder victim one and one-half years prior to his stabbing the victim to death "evidence[d] an enduring hostility toward [the victim] and to that extent cast[] doubt on his claim that the stabbing . . . was unknowing." Id. at 267. Accord, State v. Donohue, 2 N.J. 381, 388 (1949) (evidence of prior beatings by defendant of his wife, and particularly of an incident that occurred eight years before her murder, was admissible "to show malice or ill will on the part of the accused toward the victim"); State v. Schuyler, 75 N.J. 487, 488 (E. & A. 1967) (evidence of an altercation between

defendant and the murder victim that occurred ten or eleven years before the murder admissible to show malice); State v. Carroll, 242 N.J. Super. 549, 564 (App. Div. 1990) (while being questioned for the murder of his step-daughter, defendant referred to an assault on his first wife eleven years earlier. This reference was held "so integral a part of his description of his state of mind at the time of his commission of this offense that it was admissible to show his intent in attacking his step-daughter."), Certif. denied, 127 N.J. 326 (1991).

The fact that Canache described events which occurred after the killings does not render her testimony inadmissible. Evidence of other wrongs admitted under N.J.R.E. 404(b) need not predate the offense at issue. "Evidence of the commission by defendant of the same or similar acts prior to, contemporaneous with, or subsequent to the offense in question may be properly admissible." State v. M.L., 253 N.J. Super. 13, 22 (App. Div. 1991), Certif. denied 127 N.J. 360 (1992). In State v. Coffield, 127 N.J. at 339-41, the Supreme Court held that if the State provided an appropriate limiting instruction, it could properly give evidence that the defendant possessed illicit drugs in September to prove that there was no mistake about his possession one month earlier. "The order of the events is not dispositive of the issue of relevance." Id. at 340.

The judge limited Canache's testimony to a general description of defendant's jealousy and to specific threats made by defendant in one incident when his threat to kill her was made in

conjunction with an admission about his first wife. Defendant's primary argument is that his threat to Camacho, "If I have to do it, I'm going to do it again," was improperly used to prove his intent to kill his first wife. The purpose of the testimony was not to show a threat to Camacho, but because he was admitting to the crimes in response to Camacho's question: "You're going to do the same thing that you did that one day." Because the admission cannot be severed from the threat, the trial judge properly permitted the testimony.

We reject defendant's contention that the trial judge's limiting instruction was inadequate. No objection was made to the instruction. The judge said: "I will give a curative instruction if [defense counsel] prepares one, and if he wants any special wording other than the one I would prepare, I'm free to accept whatever he would have and review it with him." The standard of review is plain error. R. 2:10-2. See also State v. Scher, 278 N.J. Super 249, 271 (App. Div. 1994) ("defendant expressed his general satisfaction with the judge's principal charge and cannot now condemn the very principles he urged, claiming them to be error and prejudicial"); partif. denied, 140 N.J. 276 (1995). There is no plain error.

When other bad act evidence is admitted under one of the exceptions to N.J.R.E. 404(b), the jury must be given an appropriate limiting instruction. State v. ..., 127 N.J. 340-41. This instruction "should be formulated carefully to explain precisely the permitted and prohibited purposes of the

evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere." State v. Stevens, 200 S.W.2d 115 H.L. at 309.

During Gonzales's testimony, the trial judge instructed the jury:

At the end of the case I'm also going to give you a limiting instruction in detail explaining the sole purpose for why these certain items are being allowed in. I'll ask you to accept that evidence and be prepared at the end of the evidence to factor it in for one particular area, the fact that Mr. Scabone, if you believe what the witness and other witnesses might say, had formerly maybe broken the law in regard to Mrs. Scabone or other family members, it's not in any way to be shown as a predisposition to commit a crime.

Therefore, because he may have committed a crime before, then if he did that again he might as well be guilty of these charges, too. That's not the way the system works.

In his final instructions, the judge charged the jury:

The State presented testimony during the course of this trial of a number of people. Some of those were Ana Gonzales, who is the sister of Monica Scabone and the sister of Yannet Esteves, and Leopoldo Silva, a brother-in-law of some of those individuals, pertaining to incidents and statements that were allegedly made and done by Mr. Scabone prior to the April 2, 1981 date set out in this indictment that brings us here for this trial.

You also heard testimony from Mr. Scabone's present wife, Mrs. Alvarado Canacho, regarding a threat that was allegedly made to her during the course of their marriage. This evidence was offered for a very limited and specific purpose.

As I told you during the course of the trial, evidence that a person has committed a prior wrong on a specified occasion is inadmissible to prove his disposition to commit the crimes for which he has been indicted and is presently on trial. In other words, such evidence from Mr. Gonzales, Mr. Silva and Mrs.

Alvarado Camacho cannot be considered by you as disclosing any general propensity or predisposition on the part of Mr. Scabone to commit a crime or to commit the crimes with which he is now charged.

You cannot prove one crime by proving another crime. You may only consider the evidence of the arguments, the violence, and/or the threats allegedly made and committed by Mr. Scabone against his wife, Monica Scabone and her relatives and his present wife, Mrs. Alvarado Camacho, if you believe that they were, in fact, made and done by Mr. Scabone, and solely to determine what Mr. Scabone's motive or intent was as to whether those words and actions disclosed an enduring hostility, an enduring jealousy, malice or ill-will that arose out of the marital relationship between himself and Monica Scabone and her in-law -- and his in-laws on the part of Mr. Scabone that is directed towards the three victims in this case; that being Monica Scabone, Norma Estevez and Yannet Estevez.

You may consider such evidence solely for this purpose; that is, in determining a possible motive or intent on the part of Mr. Scabone.

You cannot consider that evidence for any other purpose.

The judge added:

There's also for your consideration in this case certain oral statements alleged to have been made by Mr. Scabone to Mrs. Camacho Alvarado, to Ana Gonzalez and Leopoldo Silva. It is your function to determine whether or not those statements were, in fact, actually made by Mr. Scabone, and if they were made, whether such statements or any portions thereof are believable.

As to Gonzalez's and Silva's testimony, the charge was neither unspecific nor otherwise defective. The judge instructed the jury that it could consider the testimony as proof of defendant's possible motive or intent, and not for any other purpose.

The trial judge did not correctly explain the purpose of Camacho's testimony, instead instructing that all the testimony was probative of motive and intent. That was not reversible

error. A proper instruction characterizing the threat as an admission would have probably harmed defendant's case, particularly because defendant proclaimed his innocence throughout the trial. The jury was told it could only consider Camacho's testimony as relevant to defendant's intent or motive, and not as probative of his guilt. The error was harmless. E. 2:10-2.

Defendant argues that the marital communications privilege, as it existed in 1981, prohibited Camacho's testimony without his consent. The trial judge properly rejected this argument.

Before it was amended in 1992, the marital-communications privilege prevented a spouse from disclosing confidential communications made during the marriage unless the other spouse consented. State v. Szemplig, 135 N.J.L. 406, 414 (1994). The privilege was amended by the Legislature on November 17, 1992. N.J.S.A. 2A:84A-22, as amended by L. 1992, E. 142. The amended rule now permits disclosure of confidential communications "in a criminal action or proceeding in which either spouse consents to the disclosure." N.J.S.A. 509. The Legislature provided: "This act shall take effect immediately and, to the fullest extent consistent with constitutional restrictions, shall apply to all criminal actions regardless of the date on which the offense was committed or the action initiated." L. 1992, E. 142 (emphasis added). This plain language makes the meaning of and intent behind the rule quite clear.

The marital-communications privilege, as an evidentiary rule which merely goes to the exclusion or inclusion of evidence, is

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The marital-communications privilege, as an evidentiary rule which merely goes to the exclusion or inclusion of evidence, is

not subject to the constitutional prohibition against ex post facto laws. State v. Rathunde, 121 N.J. 137, 145-46 (1990). The amended marital-communications privilege was properly applied in a 1993 trial for a crime committed in 1981.

We reject defendant's contention that the sentence imposed upon him was excessive. A sentence will be upheld unless it deviates so far from the guidelines as to "shock the judicial conscience." State v. Roth, 95 N.J. 334, 364-65 (1984).

In imposing consecutive sentences, the trial judge applied the sentencing guidelines set forth by the New Jersey Supreme Court in State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S.Ct. 1193, 89 L.Ed.2d 308 (1986). The trial judge carefully considered all of the Yarbough factors and adequately explained how he applied them. He balanced the mitigating factors—defendant's lack of a prior record and his kidney problems—against the aggravating factors. He was careful not to double count as aggravating factors the viciousness of the multiple stabbings. He did, however, consider defendant's total lack of remorse throughout and after the trial; the "extremely high, if not a hundred percent" likelihood defendant would commit another offense; there were multiple victims; the fire could have harmed others; and the need for deterrence.

The judge rejected the argument that the offenses were committed so closely in time and place as to indicate a single period of aberrant behavior, noting the time defendant spent waiting for the three victims to come home, and the fact that

Norma and Yannet "had absolutely no contact with the initial dispute that arose into the stabbing of Monica Scabene." See State v. Ligot, 270 N.J. Super. 169, 176 (App. Div. 1993) (consecutive sentences upheld where "[e]ach [of the five killings] was committed at a different time on successive victims in separate circumstances.").

The balancing of aggravating and mitigating factors which was the basis for imposing consecutive terms for all four convictions was also properly applied in sentencing defendant to maximum base terms and parole ineligibility periods for each conviction.

Affirmed.

A-2992-0474

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION - UNION COUNTY
INDICTMENT NO. 4255-8-80

1
2
3 STATE OF NEW JERSEY, :

4 Complainant, :

5 vs. :

TRANSCRIPT OF
SENTENCE

6 ALBERTO SCABONE, :

7 Defendant. :

8
9 Date: January 14, 1994
Place: Union County Courthouse
Elizabeth, New Jersey

10 B E F O R E :

11 THE HONORABLE EUGENE J. CODEY, J.S.C.

12 TRANSCRIPT ORDERED BY:

13 OFFICE OF THE PUBLIC DEFENDER, Lisa Lynch

14 A P P E A R A N C E S :

15 THOMAS C. HUTH, ESQ.
16 ASSISTANT PROSECUTOR
For the State

FILED
APRIL 14 2006
JAN 25 2006

17
18 KEVIN A. McLAUGHLIN, ESQ. *Kevin A. McLaughlin*
DEPUTY PUBLIC DEFENDER
19 For the Defendant

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21
22
23 YVONNE DAVION, C.S.R.
OFFICIAL COURT REPORTER
24 ESSEX COUNTY COURTHOUSE
NEWARK, NEW JERSEY
25

1 THE COURT: We're here on sentence day on State of New
2 Jersey v. Alberto Scabone on indictment number 80-8-4225.

3 Could we just get the formal appearance of all the
4 parties, including the interpreter for the Public Defender's
5 Office who is present with us today who was also present
6 throughout the entire trial and proceeding for Mr. Scabone.

7 MR. HUTH: Your Honor, Thomas C. Huth, Essex County
8 Prosecutor's Office, homicide squad.

9 MR. McLAUGHLIN: Kevin A. McLaughlin from the Office
10 of the Public Defender, Essex Region on behalf of Mr. Scabone.

11 THE INTERPRETER: Sara Cohen, Spanish interpreter.

12 THE COURT: Mr. McLaughlin, have you had a chance to
13 review the presentence report? I know when we last left there
14 was a motion that was pending to have me recuse myself from
15 these proceedings. Also there was a number of letters that
16 were sent in, and I don't know if Mr. Huth was been kind enough
17 to get you copies, from a number of the family members of the
18 victims' family. There's a stack that I received just in this
19 morning's mail, some from Martha Gonzalez, Anna Gonzalez. I
20 don't know if you got copies of all the letters.

21 MR. McLAUGHLIN: Your Honor, I have not, but if it
22 please the Court, I'd like to address the motion first, if I
23 may.

24 THE COURT: Go right ahead.

25 MR. McLAUGHLIN: Your Honor, as I know the Court is

1 aware, Counsel has the highest respect for the integrity and
2 honesty of this Court. And bluntly, it pains me to have to
3 renew this motion. But notwithstanding that, I have to renew
4 the motion, your Honor.

5 I believe that this trial was conducted in a
6 scrupulously fair manner. It would be to powers greater than I
7 to determine whether it was done without legal error either on
8 my part or your part or Mr. Huth's part. But, I am going to
9 renew my application that the Court recuse itself for the
10 purpose of this sentence.

11 To recap briefly, your Honor, at the conclusion of the
12 trial, after the verdict was taken, the Court took an
13 opportunity to address the jury with regard to several issues.
14 One of those issues had to do with the admission in evidence of
15 the photograph of Monica Scabone at the party. And I was
16 concerned that the Court felt compelled to explain the
17 circumstances that may or may not have surrounded one, the
18 admission of that photo into evidence and two, what may have
19 happened or may not have happened at or about the time that the
20 photograph was taken.

21 But, of more concern was the Court's assurance to the
22 jury, at that time, that Mr. Scabone would be receiving, and
23 I'm paraphrasing, Judge, I'll rely on the record for any appeal
24 purposes, you did assure the jury that, and again by
25 paraphrase, if you had any say in the matter, that Mr. Scabone

1 would be receiving the maximum sentence for each of the
2 offenses.

3 I was concerned at the time, your Honor, that the
4 Court had pre-judged this matter prior to receiving the
5 presentence investigation report, that the Court may have
6 gotten caught up in the emotion and the excitement of the
7 trial. I asked, at that time, that the Court consider recusing
8 itself from imposing sentence in this matter. And again, so
9 it's clear, your Honor, I have the utmost respect for this
10 Court, for both its integrity and its dignity and its honesty.

11 I know that the Court always strives to impose
12 sentence or a ruling in accordance with the law. But, I am
13 concerned that the Court may have become unwittingly
14 emotionally caught up in this matter. And, I wonder if it is
15 perhaps not better, under all of the circumstances, even if
16 it's only to avoid the appearance of a problem, that the Court
17 recuse itself from imposing this sentence. I'm going to ask
18 the Court to do that and to recommend that the sentence be
19 transferred either to the assignment judge for reassignment or
20 this Court being the executive judge for the floor perhaps to
21 be reassigned to another judge here on the floor.

22 THE COURT: Mr. Huth.

23 MR. HUTH: Just briefly. I would object to said
24 motion primarily because the comments made by the Court, and I
25 want the record to be clear on this, were made after, number

1 one, the verdict came out. Number two, after the jury was
2 polled as to a unanimous verdict. And number three, after the
3 Court gave its discharging instructions to the jury. It was at
4 that point, once the verdict was "sealed" that the Court made
5 comments to the jurors and told the jurors certain things in
6 the case that they were not allowed to hear during the course
7 of the deliberation.

8 I find nothing wrong with that. Number one is that I
9 think the jury should be entitled to hear certain things that
10 were withheld from them during the course of their
11 deliberations, after they have deliberated and rendered a
12 verdict. So, there has been no prejudice, whatsoever, to the
13 jury. Number two, I can't understand how your Honor could
14 possibly prejudice himself by voicing opinions that he had
15 after hearing 2 weeks of testimony of this trial.

16 This trial was one of the most emotional ordeals I
17 have ever been involved in. And to just sit there and to
18 pretend that it doesn't effect you is inhuman. You voiced
19 concerns or strike that, you voiced your emotions. I find
20 nothing wrong with that. In the meantime you have had an
21 opportunity to look at a presentence report. You will have an
22 opportunity to listen to Counsel and possibly the defendant if
23 he wishes to talk and you will have an opportunity to listen to
24 family members. And I am confident that the Court can make its
25 decision based upon that.

1 I just don't think that you can sit up there in a
2 vacuum and listen and go through an ordeal like this and not
3 have some opinion and not have some feeling about it. I do not
4 think that will cloud your judgment regarding today's
5 sentencing.

6 It was a very emotional trial. It was a very
7 upsetting trial for everyone involved. And I kind of thought
8 that your comments were appropriate. It's because of that,
9 Judge, I don't think you should recuse yourself.

10 THE COURT: Okay. When Mr. McLaughlin did in fact
11 make the motion, I did check up on the statutes and the court
12 rule that does apply. And just for purposes of an appellate
13 tribunal reviewing this proceeding, because I'm not going to
14 recuse myself, I did, in fact, review the court rules,
15 including but not limited to rule 1:12-1. And some of the
16 applicable case law including but not limited to State vs.
17 Courtney which is cited at 199 N.J. Super. at page 368. And, I
18 see absolutely no reason, either in case law or in the court
19 rules, for me to recuse myself from these proceedings.

20 I sort of try to make sure that everybody gets a fair
21 trial in this Court and I think that's why the attorneys like
22 to try trials up here. And many of the rules that were
23 presented during the course of the case I know upset the
24 Prosecutor's Office because a lot of them were very, very
25 favorable to Mr. Scabone, especially including a number of the

1 photographs and a number of evidence regarding prior beatings
2 and abuse by Mr. Scabone upon Mrs. Scabone that were withheld
3 from the jury.

4 I always try to let my jurors know reasons for delays
5 in trial and what went on in there absences at side bars. I
6 think jury members, after a verdict is in fact sealed, is
7 entitled to know a little bit about the case, what went on and
8 certain reasons for certain things that were done during the
9 course of the case. And that's what I attempted to do in this
10 case.

11 So, I fully intend to go forward with the sentencing
12 today. Mr. McLaughlin has preserved the rights of Mr. Scabone
13 today in the event that an appellate tribunal disagrees with my
14 philosophy. And assuming it will be upheld, as of today, I
15 have no intention of having this case be reassigned to another
16 judge because I don't think anything was done improper in this
17 case.

18 Mr. McLaughlin, I know we initially discussed about
19 some of the letters. I don't know if there was a whole sheaf
20 of documents that came in in today's mail. I don't know if you
21 had a chance, all from family members. Again every one of the
22 letters was very emotionally written, all asking for the
23 maximum custodial sentence to be imposed on Mr. Scabone.

24 In fairness to you, I don't know if you need a chance
25 to look at each and every letter. They basically asked the

1 Court not to shave any time off of Mr. Scabone's possible
2 exposure and sentence him to the maximum under the statute that
3 was in effect back when this incident occurred, which was the
4 old homicide statute. Subsequent to the date of the offense,
5 the statute was amended to a much higher degree of exposure.
6 But Mr. Scabone's coming under the old statute.

7 MR. McLAUGHLIN: Your Honor, I had not had an
8 opportunity to review the letters but I can indicate to the
9 Court that it's not necessary for me to review them prior to
10 the imposition of sentence. I would appreciate the opportunity
11 to review them perhaps after the sentence proceeding. But
12 counsel does not feel that there could be anything in the
13 letters that would provide the basis for some legal objection.
14 Family members are absolutely entitled to express their
15 feelings. And in a case such as this, one would expect those
16 feelings to be strong and emotional.

17 I would appreciate the opportunity to review them but
18 it's not necessary that we review them prior to the imposition
19 of sentence.

20 THE COURT: No problem. We'll make you up a complete
21 xeroxed set of documents. And, again, none of the documents
22 are in mitigation of Mr. Scabone's sentence, but to the
23 opposite. They're all asking for the maximum sentence to be
24 imposed upon Mr. Scabone.

25 MR. HUTH: Judge, just for the record, I told family

1 members if they wish to write letters to send them directly to
2 the Court. I must have not seen the substance of those letters
3 either. So if I had them I would have given them to Mr.
4 McLaughlin.

5 THE COURT: No problem. Truthfully the mailman just
6 came before we came out. I just got them and they were for Mr.
7 Scabone so I brought them out with me.

8 MR. McLAUGHLIN: I've had an opportunity to review the
9 presentence investigation report with Mr. Scabone. We find it
10 to be accurate and sufficient for the purpose of sentence. I
11 would make note of the following correction, a minor one at
12 that, your Honor. On page 1 of the section entitled Uniform
13 Defendant Intake which is approximately the seventh page in the
14 report, the report is paginated, at least the copy that I have,
15 Mr. Scabone's birth date is indicated as being 10/5/53 there.
16 On the face page of the report is the true birthdate of 11/5/54
17 as indicated.

18 THE COURT: Note that correction.

19 MR. McLAUGHLIN: Other than that, we find the report
20 to be accurate sufficient for the purpose of sentence.

21 THE COURT: Okay. Mr. McLaughlin, any statements
22 you'd like to make on behalf of Mr. Scabone? Anything Mr.
23 Scabone himself would like the Court to hear?

24 MR. McLAUGHLIN: Your Honor, I would like to address
25 the Court, if I may, with regard to the imposition of sentence.

1 THE COURT: Sure.

2 MR. McLAUGHLIN: Your Honor, I would note first that
3 inspite of the commentary during the course of trial and prior
4 to the trial, no one has seen fit to adduce any evidence that
5 Mr. Scabone has ever been accused of or convicted of any
6 criminal conduct anywhere outside of the United States. The
7 prior adult criminal history indicates a charge with an arrest
8 date of March 31, 1980 that was dismissed one month, I'm sorry,
9 the next day, I apologize, according to the report and then
10 this matter appears.

11 There's no indication of any juvenile history. And as
12 nearly as I can tell, there's no evidence of any problems with
13 the law outside of the United States. There may well be, but I
14 don't have competent documentation to that effect and nor does
15 the Court. So, preliminarily I'm addressing that matter. Mr.
16 Scabone has no prior indictable convictions. Has no prior
17 convictions of any kind.

18 I should state, your Honor, that in the text of the
19 report, Mr. Scabone indicates that he is, in fact, innocent.
20 And, in essence, re-alleges that which he alleged in his
21 testimony at trial. I do not, in any way, want the Court to
22 feel that I am in any way, that he is, in any way, coming away
23 from his assertion of innocence. I have to address the Court
24 based on the conviction that was returned by this jury.

25 If I make references to acts committed to Mr. Scabone,

1 attributed to Mr. Scabone, those will be obviously because the
2 jury has convicted him of those. I don't want anyone to feel
3 that I have in any way conceded that he is in fact guilty of
4 these offenses. But, Mr. Scabone understands, as does counsel,
5 he is convicted of these offenses and he will be sentenced on
6 them.

7 Given that, your Honor, I think that we should move to
8 what is the appropriate sentence. Obviously one of the first
9 things that we would want to deal with in the imposition of the
10 sentence under circumstances such as this is the double
11 counting of aggravating factors. One of the problems, if you
12 will, with convictions for homicide and its subspecies is that
13 those convictions presume the death of the victim. And,
14 obviously the Court is aware that the seriousness of the harm
15 is simply not something that we can consider when the verdict
16 is some form of homicide.

17 I wanted to be clear to all persons, there are 3
18 people dead. Mr. Scabone stands convicted of causing those
19 deaths. I think the most salient point to be considered in
20 imposing sentence is what were the circumstances surrounding
21 the commission of the crime. Again, assuming for the purpose
22 of this argument that Mr. Scabone committed the crimes, the
23 State, during the trial, through Miss Camacho and through
24 attempts to characterize circumstantial evidence, I'm sure, is
25 going to urge upon the Court that Mr. Scabone, cold-bloodedly

1 and without feeling of any kind, executed Norma and Yanette.

2 That's not so, your Honor. That is simply not so. It
3 flies in the face of the proofs in this case. It flies in the
4 face of the verdict in count 1. Your Honor, the State can't
5 have it both ways, either Mr. Scabone was subject to bursts of
6 temper during which he lost control, or he's a cold-blooded
7 murderer, one or the other.

8 Now, they got their conviction based on theory, number
9 1. That's how they got it, that he would fly into a rage and
10 abuse his wife. And in point of fact he flew into a rage on
11 this date and ultimately caused her death. I guess the State
12 will urge that he then had some period of time to consider what
13 he would do next. I should indicate to the Court that there's
14 no proof of that whatsoever. It would appear that the jury
15 agreed the killing of Monica Scabone was done in the heat of
16 passion pursuant to adequate provocation. And I think that in
17 some large measure we have to accept that part of the verdict
18 as well.

19 They say it happened that way, Judge. I don't say it.
20 Mr. Huth doesn't say it. The jury says it. Heat of passion,
21 adequate provocation.

22 Now, do the subsequent deaths, the ones for which the
23 jury returned verdicts of murder, do we characterize those as
24 being committed after a sufficient period of time had passed to
25 allow Mr. Scabone to rationally think through what had

1 happened? I suggest, your Honor, that the excitement of the
2 one killing and the irrationality that in fact caused it to
3 occur in the first instance, was carried over. He should never
4 have killed Monica. That's obvious.

5 Obviously he should never have killed Yvette or
6 Norma. But, to assume that the one was done in the heat of
7 passion and the other one was done upon cold passion, it's just
8 an assumption. It's a continuation, obviously a continuation
9 of agitated state that the jury felt it was not appropriate to
10 convict of passion provocation manslaughter. We accept that
11 verdict. But, I've read Mr. Huth's sentence memorandum, Judge.
12 He wants you to give 4 consecutive nose to nose sentences. He
13 wants you to give 30 with 15, 30 with 15, that's 60 with 30.

14 Then he'd like you to give 10 with 5 to count one,
15 that would be 70 with 35, and then we got a second degree
16 arson. What the heck, we'll throw in another 10 with 5 for
17 that. That would be 80 with 40. A genteel sufficiency under
18 anybody's criteria. But, your Honor, that fails to take into
19 account what happened. Simply running these sentences
20 consecutive will satisfy the blood lust that runs in all of our
21 veins to some extent or another.

22 It would certainly, I don't think it would satisfy the
23 family members of the deceased victims. But it's the maximum
24 that you can give and that's what they'd have to live with.
25 And certainly that's what they want you to give. But, I think

1 your Honor needs to take a longer look at this incident. This
2 was one incident. This was not a series of incidents. This
3 was one circumstance from the moment the knife was wielded
4 against Monica Scabone -- if in fact she was the first person
5 killed, I think we have to accept that based on what the jury
6 verdict is -- until the time that the fire was set.

7 If you choose to take a series of snap shots then it's
8 very easy to impose consecutive sentences. It's simple. These
9 are discreet events. Your Honor, I don't think the Court
10 believes that these are discreet events. I think the Court
11 should be well satisfied that this was something that took
12 place, at least in Mr. Scabone's mind, all at once in a jumble.
13 I'm not looking to excuse the taking of human life. It's
14 inexcusable at any level and we are without power to seek the
15 appropriate retribution.

16 Your Honor, I'm not a particularly religious person
17 but I do believe that that power rests only in one place and
18 it's not here in this courtroom. A higher authority will
19 ultimately judge Mr. Scabone. We have to do our job now.

20 I am going to urge upon the Court that the Court see
21 this for what it really was, which is one ongoing course of
22 conduct. One incident all provoked by the same, unjustifiable
23 perhaps, but the same rage.

24 Mr. Scabone indicates in the presentence report that
25 he suffers from depression. He believes his mental health to

1 be poor. There's certainly evidence in the trial testimony
2 that others believed that he was in need of psychiatric help.
3 There's evidence that he was confined to a psychiatric
4 institution. I think there's evidence that he escaped from
5 that institution. To characterize Mr. Scabone as being a
6 dangerous psychotic on the one hand and a cool dispassionate
7 killer in the other, would be for the simple expedience of
8 giving him the maximum, Judge. It wouldn't reflect what is
9 true. It's either one or the other.

10 The real truth is, your Honor, that these sentences
11 should be run concurrent to one another and that presents a
12 problem for us, for the Court, for the litigants. You see,
13 we've gotten used to the new 2C, Judge. Murderers now get 30
14 years without parole. That's what they get. That's what the
15 law says they get. But, justice and the law on April of 1981
16 provided that murder was 30 with 15. That was the law and that
17 was the maximum then, Judge.

18 All the discussion in Mr. Huth's sentence memo about
19 Yarborough is in some measure unnecessary. No one can deny
20 that there are 3 dead bodies, 3 human beings are gone. But,
21 the imposition of this sentence should take into account more
22 than that lust for punishment. Thinking persons reviewing the
23 totality of this case cannot help but conclude that all of this
24 took place in one jumble. Again, I'm not trying to justify it
25 but I think it's important to understand that these are not

1 cold and dispassionate acts that are independent of one
2 another. Bad decision making, oh absolutely, to the point of
3 taking human life, not to be rationally explained.

4 But, I didn't think that one could conclude that Mr.
5 Scabone was being irrational at the time. Had it been that
6 everyone recognized how dangerous his bursts of temper were
7 previous, if he had gotten some treatment, I can't guess at
8 that, Judge. But I hope the Court's not going to guess at some
9 cold and dispassionate, you know, this theory of the case where
10 he kills his wife and then he sits there tapping the knife on
11 his hand until the rest of the family members get home.

12 There's certainly an inference of that from the
13 testimony of Camacho. But it's just that, it's only an
14 inference, Judge. And even if it were so, that still would not
15 mean that Mr. Scabone had returned to his right senses in time
16 to prevent those 2 additional killings. It is wholly
17 ~~appropriate for this Court to impose concurrent sentence,~~
18 Judge, your Honor. Yarborough says you should generally
19 impose, if the Court feels it's appropriate, 2 consecutive, the
20 more serious.

21 But, Yarborough also says that one should look at
22 whether it was simply one incident. Whether it's derivative of
23 the same excitement that caused the jury to convict for passion
24 provocation in the first instance.

25 I'm not trying to excuse the death of Mr. Scabone's

1 mother-in-law and sister-in-law, but, your Honor, I think 4
2 consecutive sentences is preposterous under the circumstances.
3 It may leave some feeling a little cold, but that may well be
4 because we've become used to the more serious punishments that
5 the legislature subsequently enacted. I think we need to
6 divorce ourselves from that, Judge. We need to go back to 1981
7 when the law was 30 with 15.

8 I would ask the Court to impose a sentence in toto of
9 30 years with a 15 year period of parole ineligibility. And I
10 don't say that lightly, your Honor. Because if the Court chose
11 to run the 4 counts concurrent to one another, you don't have
12 to give 30 with 15. Mr. Scabone's got no priors. There are
13 any number of mitigating factors that could apply to Mr.
14 Scabone, not the least of which is that he may not have been in
15 full control of his faculties at the time, your Honor.

16 Thirty with 15 back in those days, if you had a 18 or
17 19-year-old defendant in front of you and you thought that he
18 had made a dreadful mistake, you didn't have to give him 30
19 with 15. You could have given him a flat 20. Now, I'm saying
20 all right go ahead, give Mr. Scabone the 30 with 15, take into
21 account the fact that those last 2 killings did not have to
22 happen. Take into account, as I'm sure the State will remind
23 you, that there were any number of stab wounds that way
24 exceeded the number required to end life.

25 There are some things about this case that are

1 unpleasant that might lead the Court to impose a sentence
2 greater than the presumptive sentence. But, 4 consecutive
3 sentences is greater than any rational sentence, your Honor.
4 Four consecutive sentences is not called for. It's not, just
5 under the circumstances..

6 I suspect that if the Court does impose the sentence
7 of 30 years with a 15 year period of parole ineligibility, that
8 you will have taken into account those aggravating factors in
9 providing, one, not only a period of parole ineligibility, but
10 the maximum period of parole ineligibility. Your Honor, I
11 think that I will conclude my comments at that point. Thank
12 you, your Honor.

13 THE COURT: Mr. Scabone, is there anything that you'd
14 like to say to the Court before we impose sentences? There are
15 a lot of members of the Estevez family present in the first 2
16 rows.

17 MR. SCABONE: I think Mr. McLaughlin defended me in
18 the right way that it should have been done.

19 THE INTERPRETER: Your Honor, may I ask Mr. Scabone
20 for one word, to clarify one word?

21 MR. SCABONE: If there were certain evidence, it would
22 have been different to begin with. Mrs. Anna in 1989 she never
23 speak.

24 THE COURT: I'm sorry, Mr. Scabone, you've got to
25 speak very slow, Mr. Scabone, because of the interpreter.

1 MR. SCABONE: Because for me I say really fast. Mrs.
2 Anna in the statement of 1981 --

3 THE COURT: Madam Interpreter, will you tell him while
4 you're interpreting he has to stay quiet so we can get what
5 you're saying. Madam Interpreter, can you put on the record
6 what you can recall he just said?

7 THE INTERPRETER: I just mentioned to Mr. Scabone that
8 while I'm speaking he remain quite.

9 THE COURT: What would you like us to know because you
10 have to go very slowly.

11 MR. SCABONE: Excuse me.

12 THE COURT: That's okay. When the interpreter is
13 interpreting for our reporter here, you can't continue to keep
14 talking or go on to a new statement because we're still doing
15 the old statement.

16 MR. SCABONE: Mrs. Anna in 1981, she never mentioned
17 about the fire. In 1989 it was taken another statement from
18 her but she never mentioned again about the fire. Let's say if
19 I killed my wife, I kill Norma, I kill Yanette, I kill Fito, I
20 kill the Peruvian and I give my car to them so they can go to
21 work, that's something stupid. Excuse me. Mrs. Halea, at the
22 end, she say that the boy knows everything. He remembers
23 everything. You may believe, you may think that I'm guilty,
24 but this is not about thinking, but it's about believing. I
25 may continue for a long time.

1 THE COURT: Anything you've got to say, Mr. Scabone,
2 now is your chance to say it.

3 MR. SCABONE: Well, I want to appeal and I'm going to
4 appeal. If I think that it was not just, excuse me, I'm
5 smiling, what else, many more things, what can I say. If Mr.
6 Nelson was allowed to give a statement, he collaborated with
7 police. If you check the reports you can see, I'm not going to
8 say that I've never said I'm going to kill you. What's more, I
9 always say, I mentioned in my cell, I came back from vacation
10 with Monica. She came the 15th. I came, we came back from
11 vacation. I came back from vacation and I killed a woman.
12 This is not the case but anyway here I am. I'm going to appeal
13 and let's see what's going to happen.

14 THE COURT: After today Mr. McLaughlin will file the
15 necessary papers. You have 45 days from today's date, Mr.
16 Scabone. Mr. McLaughlin will protect your interest by filing
17 the appeal.

18 MR. SCABONE: Thank you and excuse me.

19 THE COURT: Mr. Huth, I see a number of the members of
20 Estevez family and some of the other family members and friends
21 here today.

22 MR. HUTH: Judge, what I'd like to do is just address
23 some legal issues and then I'd like to have them talk.

24 THE COURT: Sure.

25 MR. HUTH: Judge, what was adduced during the course

1 of trial from Elliot Cammaroto Camacho was Alberto Scabone told
2 him that he had a fight with his wife and during the course of
3 the fight he told her that she grabbed the knife and then he
4 grabbed the knife from her and he stabbed her. That is
5 reflected in the jury's verdict. But, he also tells her that
6 he kills Norma, the mother, the 59-year-old mother and
7 19-year-old Yanette as they come into the apartment. This is
8 what he tells her.

9 This is not a killing that is done all at once and the
10 jury reflected that in their verdict. They said passion
11 provocation for Monica Scabone and purposeful or knowing murder
12 for both Yanette Estevez and Norma Estevez. So I submit,
13 Judge, that these are separate and distinct acts.

14 The argument that Mr. McLaughlin is making to urge
15 concurrent terms with all of these offenses, the question, in
16 my mind is, well, whose crime does he get the 30 years with 15
17 years on? Is it because of killing Yanette Estevez or is it
18 because of killing Norma Estevez? Where do you fit the
19 aggravated arson in? Where do you fit the life of Monica
20 Scabone in that sentencing scheme? What he's asking for,
21 basically, is a free crime. Give me one, run the others
22 concurrent and I'm basically going to get free crimes for 2
23 bodies.

24 I submit, Judge, that that flies against the law that
25 I have submitted in my sentencing memo. Again, Judge, the

1 crimes have different purposes. They are separate and distinct
2 acts. The first is a passion provocation manslaughter and the
3 second 2 are purposeful or knowing murder probably to cover up
4 his acts. That wasn't enunciated, but the reference is there.
5 The inference can be drawn.

6 Norma Estevez was killed with her jacket on and her
7 shoes on. Nineteen year old Yanette was killed fully clothed
8 with her shoes on. These women, the Court can draw an
9 inference, had come into the apartment and that's what they met
10 in the apartment. Then he takes the women, puts 2 twin beds
11 together, places them on the twin beds, lights them on fire
12 with a flammable liquid, hence the aggravated arson.

13 Regarding the aggravated arson, we have a whole
14 separate class of victims. Besides the fact that he's burning
15 his own premises, we have the Melillo family that lives on the
16 second and third floors. They are forced out of their house
17 because of this fire.

18 So, regarding the imposition of consecutive versus
19 concurrent sentences, I'm going to ask the Court to consider
20 the opinion of State vs. Sebastian Montouri where it is clearly
21 laid out in that case where the imposition of 3 consecutive
22 life sentences for a triple homicide that occurred over a
23 single time period in an apartment on South Orange Avenue here
24 in Newark, very similar circumstances, 3 people killed around
25 the same time within a single dwelling, the Court gave 3

1 consecutive life sentences.

2 The rationale relied on was because of the unique
3 status of murder, the present case is not controlled by State
4 vs. Yarborough. So when you're talking about consecutive
5 versus concurrent sentences, the Supreme Court, the Appellate
6 Division, has said that murder holds a different type of light.
7 Specifically it states that in State vs. Zarinski, 75 N.J. 101
8 on page 107, and I quote, "the legislature has not expressly or
9 inferentially suggested an intent to reduce the punishment for
10 those convicted of multiple murders."

11 These are 3 murders. Now, one is a murder committed
12 in the heat of passion but they are 3 murders. It goes on to
13 say that the legislators' intent that a defendant may be
14 subject to a life term for every homicide of which he is found
15 guilty. So, the case law is there. It takes homicide and it
16 separates it from every other offense as it should.

17 Your Honor, that brings us to the point where now you
18 must make a determination whether or not you can impose the
19 maximum for each of these offenses and that is going to be
20 based upon the aggravating factors. Do the aggravating factors
21 outweigh the mitigating factors under 2C:44-1. I submit that
22 aggravating factor number 1 does apply. Even though this is a
23 murder and you can't say that the gravity of harm inflicted the
24 deaths, I agree with that. However, we're talking about a
25 situation where these 3 women were stabbed a total of 96 times

1 and then the desecration on the women because their bodies were
2 thrown on the bed, doused where a flammable fluid and lit on
3 fire.

4 So there is a specially heinous nature to this
5 particular offense. That's why I submit that aggravating
6 factor number 1 does apply. Aggravating factor number 2, the
7 gravity and seriousness of the harm inflicted on the victim,
8 including whether or not the defendant knew or reasonably
9 should have known that the victim of the offense was
10 particularly vulnerable to advanced age. Norma Estevez was 59
11 years old. There is an aggravating factor in number 12 that
12 does not apply because if Norma Estevez was 60, aggravating
13 factor number 12 does apply.

14 So, we're talking about a 59-year-old woman who,
15 because of her advanced age, probably cannot defend herself
16 like a younger woman could, and that should count as an
17 aggravating factor. Aggravating factor number 3, the risk that
18 the defendant will commit another offense. Judge, you even
19 heard evidence of that. I'm not talking about a conviction,
20 but you heard Elliot Cammaroto Camacho say that this guy had
21 told her that he was going to kill her just like he killed his
22 family in New Jersey. And she asked him really, like the way
23 you would do to your family in New Jersey and he said yes, if I
24 have to, I will.

25 So there's a risk that he's going to do it again.

1 Aggravating factor number 9 is a need for deterrence. I mean,
2 I don't even have to address that. This type of conduct has to
3 be deterred.

4 Judge, I submit that because of the aggravating
5 factors outweigh the mitigating factors number 1, the Court can
6 impose the maximum terms. We're talking about a 10-year period
7 for the manslaughter with 5 years without parole. A 10-year
8 period for the aggravated arson with 5 years without parole and
9 then a 30-year term with 15 years without parole for each of
10 the murders.

11 What I'm asking the Court to impose is a total term of
12 80 years with 40 years without parole because of these
13 offenses. Judge, it's at this moment I would ask that the
14 Estevez family and friends be allowed to address the Court.

15 THE COURT: Sure. Just for the purposes of the
16 proceedings, we have an official court interpreter here with
17 us, Lauren Egbert from the A.O.C.. Ma'am, could you give us
18 your name and spell it for us please.

19 M A R T H A G O N Z A L E Z, SWORN.

20 THE COURT: What would you like to tell us?

21 MS. GONZALEZ: Your Honor, I want to tell you that my
22 life, since the second of April of 1981, to this date, has been
23 a true hell. In a constant depression I have been unable to
24 resign myself to the unjust loss of my mother and my beloved
25 sisters. Your Honor, this man who is in front of us is a man

1 without scruples, without feelings, without a heart. At this
2 moment I have pleaded with God all these years asking for
3 justice.

4 Today I ask, I plead with your Honor in the name of my
5 sister Anna Gonzalez, in the name of Elliot Alverado and in my
6 own name that you have no pity, just as he had no pity with my
7 loved ones. And that you give him the maximum sentence. If it
8 is possible, the electric chair, although this would not repay
9 the damage that he's done to us. I want also to thank the
10 ladies and gentlemen of the jury for their correct verdict.
11 Thank you.

12 Your Honor, in your hands is the peace of mind of all
13 of us. That's all. Thank you.

14 THE COURT: Thank you, Miss Gonzalez.

15 MR. HUTH: There's a family friend who would like to
16 talk.

17 THE COURT: Sure. Ma'am, could you give us your name?
18 E L E N A M A Z Z A, SWORN.

19 THE COURT: You were there for almost the whole trial,
20 right?

21 MS. MAZZA: Yes. Your Honor. Yanette was my best
22 friend, my very close, we shared many good times together.
23 March 1981 was supposed to be the happiest time of my life. I
24 share the happiness with Yanette at my wedding. That was the
25 last time I saw her, two weeks before the murders. There

1 aren't enough words to express my feelings for her and the
2 family. Alberto Scabone not only took their lives in a brutal
3 way, but he also took away a piece of all of us.

4 I pray to God all these years that this day would come
5 true. Your Honor, I ask you to give him the maximum sentence
6 allowed by the law, even though that still is not enough to
7 bring them back to us. Thank you.

8 THE COURT: Thank you, Miss Mazza.

9 MR. HUTH: Your Honor, that is the conclusion of my
10 legal comments. I submit that the law is clear, especially
11 dealing with these types of offenses, that consecutive
12 sentences are not only allowed, they're warranted.

13 Regarding the aggravated arson, that is obviously a
14 separate and distinct act because of the separate class of
15 victims involved in that case. There's just one last thing
16 that I have to say here, I just can't imagine, I cannot imagine
17 what these women went through on April the 1st of 1981 when
18 this guy attacked them like that. I can't imagine the horror
19 scene that this guy inflicted on them as they walked into their
20 apartment. I mean, that's just beyond comprehension what that
21 scene must have been like. That had to be the most horrible
22 thing in the world.

23 Judge, this case cries out for justice. This case
24 cries out for the absolute maximum term that the Court can give
25 this guy because he's going to do it again. He's done it

1 before and he has absolutely no remorse, no remorse whatsoever
2 for the deaths of these 3 women. Thank you.

3 THE COURT: Okay. This was, in fact, a 2-week jury
4 trial before this Court. Mr. Scabone was found guilty on count
5 1 to passion provocation manslaughter of the mother-in-law,
6 59-year-old Monica Scabone. On count number 2 he was found
7 guilty of murder, purposeful and knowingly, of a sister-in-law
8 19-year-old Yvette Estevez. Count number 3, he was likewise
9 found guilty of the knowing and purposeful murder of his
10 mother-in-law Norma Estevez on count 1 was passion provocation
11 of his wife Monica Scabone. The fourth and final count,
12 separate charge regarding the fact that a fire was set
13 allegedly to cover the crimes, Mr. Scabone was convicted by the
14 jury of second degree arson.

15 As already indicated, Mr. Scabone now is 40 years of
16 age. This incident goes back many, many years, April 2, 1981.
17 For those not familiar with the facts of the case, Mr. Scabone,
18 shortly after the commission of the offense, fled the United
19 States of America and basically was on the run from law
20 enforcement authorities. An indictment was returned very
21 shortly after the date of the incidents on April 2, 1981, but
22 through the benefit of the Interpol International Police
23 Network, Mr. Scabone was ultimately arrested in Central America
24 and returned to this country shortly before the time of this
25 trial.

1 On April 2, 1981, I totally agree with the jury's
2 verdict, Mr. Scabone did brutally stab and kill his wife Monica
3 Scabone. He then killed, after a passage of time, his
4 mother-in-law and then a 19-year-old Yvette Estevez who had
5 the misfortune of coming home early from school. Each victim
6 was stabbed numerous times, including stab wounds to the back.

7 I think an especially important highlight and piece of
8 evidence for the jury to consider, it was in fact brought out
9 that there was a total of 93 stab wounds allocated among those
10 3 poor victims. It was also brought out during the course of
11 the trial that especially for the victims who were killed after
12 Monica Scabone, in the scenario as the killings were provided
13 by Mr. Scabone's present wife, Miss Elliot Alverado, and she
14 indicated that Mr. Scabone said after killing his wife Monica
15 Scabone, he then lay in wait for his mother-in-law and his
16 sister-in-law.

17 That version of the situation was verified in many
18 respects by the coroner's report indicating that the bodies of
19 Yvette Estevez and Norma Estevez were in fact fully clothed.
20 People were wearing their street shoes and they had
21 windbreakers on. They were fully clothed after just having
22 come in from outdoors into their family apartment which they
23 thought was a safe place and unfortunately for them Mr. Scabone
24 lay in wait for them at that time. And, as a result of that,
25 they were all killed there.

1 After the murders, Mr. Scabone, again in an attempt to
2 flee the scene and to evade arrest, set fire to the family
3 apartment. That's bad enough, number one. But that was a
4 multi-family dwelling at 239 Bloomfield Avenue. That action,
5 not even considering the injuries that possibly could have been
6 sustained by the arriving or responding fire fighters or
7 firemen caught if a floor collapsed at that building, but also
8 was a multiple dwelling with other family members of other
9 tenants living in that building.

10 Mr. Scabone, during the course of the trial as he
11 shown on April 2, 1981, had no remorse on April 2 for anybody.
12 And he had no remorse for anybody even up to and including the
13 present day. In fact, during the course of his
14 cross-examination on the stand Mr. Scabone, I can't recount the
15 number of times Mr. Scabone laughed.
16 He thought he was having a good time here testifying in his own
17 behalf.

18 Mr. McLaughlin did an excellent job and so did Mr.
19 Huth, for that matter, but Mr. McLaughlin gave him a million
20 dollars defense in this case. The only person, Mr. Scabone is
21 looking for someone to blame for a guilty verdict in this case
22 is his own testimony from the witness stand because if anybody
23 sunk his own ship, Mr. Scabone did an admirable job in front of
24 the jury laughing and joking his way to a long custodial
25 sentence and he will have a long time to think about what he

1 did during the course of this trial and what he did back in
2 1981.

3 There obviously is a presumption of incarceration. We
4 have 3 separate deaths. These are first degree offenses and
5 also second degree offenses. I'm familiar with all the facts
6 of the case. I've also reviewed Mr. Scabone's eligibility for
7 release on parole. The mitigating factors that do apply, I
8 agree with Mr. McLaughlin, we heard mention during the course
9 of the trial that Mr. Scabone has been involved with a number
10 of international law enforcement bodies and a number of
11 different countries. But, not one iota of proof has been
12 presented in the way of certified abstract. So as for as I'm
13 concerned, Mr. Scabone has no prior record.

14 Obviously Mr. Scabone's conduct is the result of
15 circumstances unlikely to reoccur. That's an obvious one when
16 the victims are deceased. They're never going to be back on
17 this earth with us again. In regard to mitigating factor
18 number 11, Mr. Scabone has a kidney medical problem which will
19 require attention in the institution, but that's something that
20 can be addressed during his incarceration.

21 In regard to the aggravating factors, I am mindful of
22 the double counting requirement and criteria. So for these
23 reasons, I'm not going to count in aggravating factor numbers 1
24 and 2 on our list concerning circumstances being heinous and
25 cruel involving the stab wounds. Likewise, in fact, with

1 Monica Estevez had been stabbed a number of times and that his
2 mother-in-law Norma was 59 years of age.

3 Again, I don't want to be accused of double counting
4 any of the factors, so this sentence is not in any way based on
5 aggravating factor number 1 or 2. Number 3, obviously the risk
6 that Mr. Scabone will commit another offense. I think the
7 likelihood is extremely high, if not a hundred percent certain
8 that that aggravating factor applies to this case. Aggravating
9 factor number 6, the seriousness of the offense.

10 We have 3 separate victims plus the arson. So, easily
11 other people could have been injured as a result of Mr.
12 Scabone's conduct other than the 3 individuals of his own
13 family who in fact were brutally murdered by him. And,
14 aggravating factor number 9, the need for deterrence.

15 The fact that 3 human lives are lost, I don't think
16 needs to be stated anymore on the record that that obviously is
17 conduct that someone cannot incur. It's clear that the
18 aggravating factor clearly preponderate and I'm clearly
19 convinced that those aggravating factors substantially outweigh
20 the mitigating factors requiring consecutive discretionary
21 minimum terms on this case. There's no Graves aspects to this
22 case for a number of reasons, but including the fact that
23 there's no operable weapon, it was a knife that was utilized.

24 At the time of the commission of the crime it was
25 already pointed out by Mr. McLaughlin in April of 1981 the code

1 of criminal justice was different than it is today. The murder
2 statute, at that time, provided that murder is a crime of the
3 first degree. But a person convicted of murder may be
4 sentenced by the Court, number 1, to a term of 30 years of
5 which the person must serve 15 years before being eligible for
6 parole. Or number 2, as in the crime of the first degree,
7 except that the maximum term for such a crime of the first
8 degree shall be 30 years.

9 I've also reviewed the sentencing guidelines of State
10 vs. Yarborough. We've had a recent legislative change in the
11 Yarborough rule, but that legislative bill did not address
12 whether it would apply retroactively or prospectively. So
13 rather than look for an appealable issue, I'm going to consider
14 that Yarborough still applies to this situation, even though
15 that statute is no longer in effect and I am sentencing Mr.
16 Scabone in accordance with the Yarborough guidelines.

17 Those guidelines are, number 1, that there are no free
18 crimes in this system for which the punishment should fit the
19 crime. Number 2, the reasons for imposing either consecutive
20 or concurrent sentences should be separately stated on the
21 record in our decision. And some of the reasons to be
22 considered by the Court should include facts relating to the
23 crimes including under Subsection A, the crimes and their
24 objectives were predominantly independent of each other. B,
25 that the crimes involved separate acts of violence or threats

1 of violence. C, the crimes were committed at different times
2 or separate places rather than being committed so closely in
3 time and place as to indicate a single period of aberrant
4 behavior.

5 Had any of the crimes involved multiple victims, E,
6 the convictions for which the sentences are to be imposed are
7 numerous. And number 4, there should be no double counting the
8 aggravating factors. Number 5, successive terms for the same
9 offense should not ordinarily be equal to the punishment for
10 the first offense. And number 6, there should be an overall
11 outer limit on the accumulation of consecutive sentences for
12 multiple offenses not to exceed the sum of the longer terms
13 that could be imposed for the 2 most serious offenses.

14 Although Mr. Scabone's offenses may be construed as
15 being committed so closely in time and place as to indicate a
16 single period of aberrant behavior as recommended by Mr.
17 McLaughlin, even conceding that point, if in fact it does
18 exist, and I don't concede that fact because of the time
19 periods in between the arrival of the separate victims into
20 that apartment, these circumstances are vastly outweighed by
21 the fact that these offenses involved numerous multiple
22 victims. And separate and distinct the acts of violence,
23 including what I characterize as the execution style murders of
24 2 totally innocent family members who had absolutely no contact
25 with the initial dispute that arose into the stabbing of Monica

1 Scabone and the passion provocation manslaughter of Mrs.
2 Scabone, as well as the second degree arson on the multiple
3 family dwelling.

4 What is clear is the crimes committed were
5 predominantly independent of one another and they involved
6 separate acts of violence. And it was likewise apparent from
7 the trial proofs that all 3 victims were fully clothed and
8 stabbed to death individually at different times as they
9 entered the apartment. The fire was then set after all of the
10 deaths had been completed to conceal the evidence and to assist
11 Mr. Scabone in making his get away.

12 And just because Mr. Scabone went into some of the
13 facts, I'd like to go into some of the facts in case this does
14 go up on appeal.

15 Mr. Scabone is trying to give the impression that he
16 didn't know what was going on, he panicked, he just acted
17 irrationally. But Mr. Scabone knew enough to get his passport.
18 He knew enough to pack his suitcase. He knew enough to take
19 his t.v. set. He knew enough to get his son Tito's passport.
20 He knew enough to get up to the place of employment to get his
21 last pay check.

22 He knew enough to have his friends cover for him at
23 work so no one would be looking for him. He knew enough to
24 check his former travel agent to try to get the cheapest flight
25 out of the country. He knew enough to try to contact family

1 members in Florida to see if he could try to get to Costa Rica
2 by going down through Florida.

3 So he was in a panic all right and showed such remorse
4 that 6 or 7 days later he is basically trying to date another
5 woman in the Square at Mexico City. And he's deeply in remorse
6 for the loss of his family, 7 days later he's starting up a new
7 family acquaintance who he ultimately married, Mrs. Alvarado
8 Estevez who was here during the course of the trial. So that's
9 the mind set so the Appellate Division is also aware of all of
10 those factors when this case goes up on appeal.

11 The primary criteria for the severity of punishment
12 obviously is the gravity of the defendant's crimes here. They
13 don't come any higher. We have, with the loss of 3 human
14 people, their lives, all their careers, everything that they
15 had going for them. The wounds were extensive. We saw the
16 doctor, Dr. Tambor, he testified that there was over 90 stab
17 wounds. Arson, the multiple dwelling absolutely no concern for
18 the safety of anybody else in that building, including the
19 firemen or any of the other tenants. His only thought was just
20 to get away as clean as he could and try to get out of the
21 country before anyone found out what was going on.

22 My primary rule is as the extent of Mr. Scabone's
23 brutality and violence rises, obviously so too should the
24 number of years that Mr. Scabone is locked up so he can't do
25 anymore damage to the community.

1 So, it is therefore the intent of this Court by these
2 consecutive sentences with parole ineligibility terms that Mr.
3 Scabone be sentenced to the maximum possible sentence allowed
4 by the law and this is the only way that society can be
5 protected and justice can be served.

6 So, on count number 2, the purposeful and knowing
7 murder of Ynette Estevez, I'm committing Mr. Scabone to the
8 Commissioner for a term of 30 years with a 15-year period of
9 parole ineligibility and violent crime penalty of \$30 under the
10 old statute. I am, on count number 3, the purposeful and
11 knowing murder of Norma Estevez, his mother-in-law, the woman
12 who loaned him money all the time so he would utilize that
13 money during the course of his daily life and he paid her back
14 by stabbing her to death, he's committed to the custody of the
15 Commissioner of the Department of Corrections for a term of 30
16 years with a 15-year period of parole ineligibility. This
17 ~~sentence to run consecutively to count number 2.~~ Another
18 violent crime penalty of \$30.

19 On count number 1, the passion provocation
20 manslaughter of his wife, at the time, Monica Scabone, I'm
21 committing Mr. Scabone to the custody of the Commissioner for a
22 term of 10 years with a 5-year period of parole ineligibility
23 to run consecutive to counts 2 and 3. Violent crime penalty of
24 \$30. And on count number 4, the second degree arson, you're
25 committed, likewise, to the custody of the commissioner for a

1 term of 10 years with a 5-year period of parole ineligibility,
2 to run consecutive to counts 1, 2 and 3. And violent crime
3 penalty \$30.

4 Just so the judgment of conviction is clear, all
5 sentences to run consecutive to each other. No sentence is to
6 run concurrent. Everything is to run consecutive to each
7 other. Aggregate total is 80 years in prison, 40 years without
8 parole. I'm committing Mr. Scabone, if he makes it through
9 prison, will be 80 years of age when he is released from
10 prison.

11 Mr. Scabone, there was no death penalty, just so the
12 family members know, that was in effect at that time.
13 Likewise, the sentencing statute was amended but it was after
14 Mr. Scabone's date. So I know one of the family members asked
15 for death penalty. This is not a death penalty case.

16 Mr. Scabone, you've got 45 days from today's date to
17 appeal the sentence. If you can't afford a lawyer, one will be
18 assigned to represent you upon application to the court free of
19 charge. Do you understand that you have that right, Mr.
20 Scabone, if you want to appeal? Mr. McLaughlin has already
21 informed the Court that he is going to file all the paperwork
22 that you're concerned about for that appeal on counts 1, 2 and
23 3.

24 MR. SCABONE: Yes.

25 THE COURT: You've got 336 days jail credit. There's

1 no dismissal on this account. And Mr. Scabone, just based on
2 the fact that a search was done down on the jail floor today
3 and I think certain items of weapons were recovered from your
4 person, I'm just advising you, don't make any statements, but
5 I've been informed that the Prosecutor's Office is going to
6 file formal complaints against you arising out of the incidents
7 that occurred down in the holding cell area for this morning.

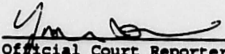
8 So, if we get those complaints, we can address them.
9 I didn't consider them for today's proceeding because I don't
10 know what they totally involve.

11 (The proceeding is concluded.)

12 *****

13 C E R T I F I C A T E

14
15 I, YVONNE DAVION, CSR, License Number XI01280, an Official
16 Court Reporter in and for the State of New Jersey, do hereby
17 certify the foregoing to be prepared in full compliance with
18 the current Transcript Format for Judicial Proceedings and is a
19 true and accurate transcript of my stenographic notes taken in
20 the above matter to the best of my knowledge and ability.

21
22  , CSR
23 Official Court Reporter
24 Rm. 111 Essex County Courts Bldg.
25 Newark, New Jersey.

1 Date: 7-5-74

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN RE:

EXCESSIVE SENTENCING
ORAL ARGUMENTS

)
)
) TRANSCRIPT
) OF
) RECORDED PROCEEDINGS

Place: Hughes Justice Complex
5th Floor, North Wing
Trenton, New Jersey

Date: March 8, 2006

B E F O R E:

THE HON. ERMINIE L. CONLEY, J.A.D.
THE HON. MICHAEL WINKELSTEIN, J.A.D.

FILED
APPELLATE DIVISION

APR 25 2006

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STATE V. ALBERTO SCABONE

DOCKET NO. A-2992-04T4

JUDGE CONLEY: State versus Scabone.

MR. SOFFER: Jerry Soffer, Assistant Deputy
Public Defender, for Mr. Scabone.

JUDGE CONLEY: Hold on.

(Pause)

JUDGE CONLEY: Sorry, okay.

MS. CUNNINGHAM: Assistant Prosecutor LeeAnn
Cunningham, on behalf of the State.

MR. SOFFER: Your Honor, Mr. Scabone is now
serving a sentence of 80 years, 40 without parole, for
offenses occurring in 1981, those offenses being
manslaughter, murder, murder, second degree arson. This
is an appeal of the denial of his motion to correct an
illegal sentence under Natale.

At the time of the commission of these
offenses under the Code, murder was a crime of the first
degree. But a judge had the option of sentencing for up
to 30 years, 15 without parole, or for a 30 flat.

Now, since murder was a crime of the first
degree as the statute read at the time the offenses were
committed, I would submit that the proper sentences
should have been for manslaughter instead of the ten
with five he got. It should have been a seven. Instead

1 of the 30 with 15 he got for the two murders, they
2 should have been two 15 year sentences and for the
3 arson, instead of the ten with a five --

4 JUDGE CONLEY: You know, wasn't this same
5 argument made in connection with a prior -- the 2004
6 motion that was denied --

7 MR. SOFFER: That was denied, and then this --

8 JUDGE CONLEY: -- by Judge Codey, and there
9 was no direct appeal from that, right?

10 MR. SOFFER: It was denied, Your Honor, yes.
11 I --

12 JUDGE CONLEY: And there was no direct appeal
13 from that, right?

14 MR. SOFFER: As I understand it, Judge Cassini
15 -- this is an appeal from Cassini's --

16 JUDGE CONLEY: Right, yes, but in his decision
17 he said, look, you raised this before. Judge Codey
18 denied it.

19 MR. SOFFER: He denied it by letter, yes, Your
20 Honor. But I don't think -- I'm not sure that these
21 issues were precisely raised in the --

22 JUDGE CONLEY: Okay, all right. And he also
23 says in addition, you were sentenced in 1994, and the
24 petition then exceeds the five year statute of
25 limitations.

1 MR. SOFFER: That is correct, Your Honor. I
2 believe he said that he did not have access and, you
3 know, the proper knowledge to do this at the time.

4 JUDGE CONLEY: Okay, okay. I don't know.
5 This is beyond me. Why is this here?

6 MS. CUNNINGHAM: Good question, Your Honor. I
7 believe it's here because the defendant wants to
8 endlessly appeal his case.

9 Just briefly I'll refer to the facts, Your
10 Honor, because they really should be mentioned, and then
11 I will discuss a procedural history.

12 The defendant bludgeoned his wife to death,
13 then laid in wait for his mother-in-law and
14 sister-in-law to arrive in the home. He then bludgeoned
15 them to death. In fact, the record indicates that all
16 three women were stabbed a total of over 90 times.
17 Then, to conceal his crime, he lit the apartment on
18 fire, also placing his neighbors at risk. So those are
19 the facts that we're dealing with, a very horrific
20 crime.

21 The defendant then, after he lit the apartment
22 on fire, essentially was then a fugitive for 12 years.
23 He was then discovered because he then threatened to
24 kill his second wife, and that's how New Jersey was able
25 to locate the defendant after all those years.

1 Now procedurally, the defendant was then
2 brought to trial in 1993 --

3 JUDGE CONLEY: We know all of that.

4 MS. CUNNINGHAM: Okay. Skipping forward, Your
5 Honor, after the trial, the defendant appealed the
6 matter in his direct appeal and --

7 JUDGE CONLEY: We know all that, too.

8 MS. CUNNINGHAM: Okay, okay. Essentially,
9 Your Honor, what I'm going to say is that there was a
10 direct appeal, there was a petition, there was a habeas,
11 there was a PCR. Then the defendant in 2000, as you
12 noted, filed before Judge Codey. Instead of taking a
13 direct appeal, as you noted --

14 JUDGE CONLEY: He tries again.

15 MS. CUNNINGHAM: -- he tries again before
16 Judge Cassini, and now we're here. So procedurally, the
17 defendant is clearly barred in raising this claim. And
18 with respect to the merits, the argument simply doesn't
19 make sense because Natale, when it was decided, was --
20 the Court found that it was going to apply it pipeline
21 retroactive.

22 JUDGE CONLEY: Right, right.

23 MS. CUNNINGHAM: In other words, the direct
24 appeal had to be pending at the time. And his appeal --

25 JUDGE CONLEY: It doesn't apply here.

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MS. CUNNINGHAM: -- it doesn't apply here.

JUDGE CONLEY: Okay.

MS. CUNNINGHAM: Thank you.

* * * * *

CERTIFICATION

I, BETH ANNE PRUNCHAK, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number ESOA 1, index number from 0046 to 6929, and tape ESOA 2, index number 0016 to 1113, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded, and to the best of my ability.

Beth Anne Prunchak

Date: April 21, 2006

BETH ANNE PRUNCHAK

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